No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE PITT NEWS,

Petitioner,

—v.—

D. MICHAEL FISHER, MAJOR FRANCIS KOSCELNAK, and JOHN E. JONES, III,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Should a state statute that imposes a content-based commercial speech ban on a class of newspapers be exempt from First Amendment scrutiny?

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In the Supreme Court of the United States
October Term, 2000

The Pitt News, *Petitioner*

v.

D. Michael Fisher, Major Francis Koscelnak, and John E. Jones, III, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner respectfully petitions this Court for a writ of certiorari to review the June 6, 2000 judgment of the United States Court of Appeals for the Third Circuit which found that the First Amendment did not apply to a newspaper's speech and press clause challenge to a Pennsylvania statute that bans advertisements about the price and availability of alcohol in publications published by, for or in behalf of any educational institution.

OPINIONS BELOW

The Order of the Court of Appeals denying rehearing *en banc* is dated August 17, 2000, and is reprinted in the appendix ("Pet. App.") at 47a. The opinion of the Court of Appeals upholding Pennsylvania Code 47 P.S. §4-498(e)(5) is published at 215 F.3d 354 (3d. Cir. 2000) and is reprinted at Pet. App. 1a. The decision ("Adjudication") of the district court upholding the statute is unpublished, but is reprinted at Pet. App. 25a. The district court's July 1, 1999 Order

denying Petitioner's motion for preliminary injunction is reprinted at Pet. App. 45a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the U. S. Constitution provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech or of the press." The Fourteenth Amendment, which provides in pertinent part that no state shall "deprive any person of life, liberty, or property without due process of law," makes the guarantees of the First Amendment applicable to the states.

The constitutional challenge in this case is brought against a Pennsylvania statute found at 47 P.S. §4-498(e)(5) ("Act 199), which reads in relevant part as follows:

§4-498. *Unlawful advertising*

(e) The following shall apply to all alcoholic beverage and malt beverage advertising:

(5) No advertisement shall be permitted, either directly or indirectly, in any booklet, program book, year book, magazine, newspaper, periodical, brochure, circular or other similar publication published by, for or in behalf of any educational institution.

(g) For purposes of this subsection, the term "advertisement" shall mean any advertising of

> alcoholic beverages through the medium of radio broadcast, television broadcast, newspapers, periodicals or other publication, outdoor advertisement or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.

STATEMENT OF THE CASE

This case involves a First Amendment speech and press clause challenge by a university student newspaper to a Pennsylvania statute that bans advertisements about the price and availability of alcohol in "publication[s] published by, for or in behalf of any educational institution." The material facts in the case are not in dispute.

The Pitt News

Petitioner, *The Pitt News,* is a certified student organization at the University of Pittsburgh (hereafter "Pitt") which publishes a newspaper on each weekday during the school year and weekly during the summer. *The Pitt News* "operates in the same fashion and under the same journalistic and newspaper business standards that govern non-student daily newspapers, such as the *Pittsburgh Post Gazette* and the *Pittsburgh Tribune Review*." Pet. App. 31a[1]. The paper

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[1] *The Pitt News* is governed by a Student Publications Board (hereafter "Board") that consists of between 14 and 16 members, virtually of all whom are either Pitt students or individuals unrelated to Pitt who meet certain qualifications, e.g., "persons with professional experience in business" or "in editorial journalism." Pet. App. 30a. The Board is the publisher of *The Pitt News* and "has all publishing responsibilities and authority, excluding those related to the editorial and advertising content of the [newspaper]." *Id.* The Board's chief responsibilities are oversight of funds and selection of the

(continued...)

is distributed free of charge in news racks at 75 locations around the school campus. Pet. App. 4a. Approximately 75% of the 33,000 students, faculty and staff at the University of Pittsburgh, the primary readers of *The Pitt News,* are 21 years of age or older. *Id.*

The Pitt News' sole source of revenue is advertising sales. *Id.*[2] Prior to 1997, *The Pitt News'* derived approximately 3% of its revenue from advertisements placed by restaurants and taverns (as opposed to alcohol manufacturers) that listed the price and availability of alcoholic beverages. The length of the newspaper is dependent directly on the amount of advertising. *The Pitt News* subscribes to a 50% / 50% formula, typical of the newspaper industry, whereby approximately half of the paper must be devoted to advertising and the other half to news stories. Pet. App. 6a. If the paper drops below this proportion, it will lose money. Therefore, less advertising translates directly into less news space.

Act 199

In 1996, the Commonwealth of Pennsylvania amended its Liquor Code to provide criminal penalties for the

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[1] (...continued)
student editors-in-chief and the business manager. *Id.* Neither the Board nor a Board-appointed faculty member, who serves as the Student Media Advisor, has any editorial control over either substantive or advertising content in *The Pitt News*. *Id. The Pitt News* is operated entirely by Pitt students. Pet. App. 30a-31a. The Editor-in-Chief, a Pitt student selected by the Board, has final editorial control over the substantive content of *The Pitt News*. *Id.* The student business manager is responsible for the newspaper's business and advertising practices. Pet. App. 31a.

[2] *The Pitt News*' operating budget in the 1998-99 academic year was $604,509. Pet. App. 30a.

advertisement of alcoholic beverages in "publication[s] published by, for or in behalf of any educational institution. Pub. L. 1523, No. 199, §5; codified as 47 P.S. §4-498 (1996) (hereafter "Act 199"). Pet. App. 6a.[3] Any person or entity which advertises in violation of Act 199 commits a misdemeanor and can be fined $100-$500 or imprisoned for up to three months upon a first offense. 47 P.S. §4-494(a). Pet. App. 5a. A second offense carries a mandatory minimum sentence of three months imprisonment. *Id.*

The Commonwealth enforces Act 199 only against liquor licensees and manufacturers. *Id.* "Thus, a bar or restaurant that advertises drink specials or other information pertaining to alcoholic beverages in *The Pitt News* could be subject to criminal sanctions, but *The Pitt News* or its staff could never be prosecuted." *Id.*

The law prohibits advertisements mentioning the price or availability of alcohol in all publications associated with any educational institution, including universities, graduate schools and adult education programs. Pennsylvania Liquor Control Board, Advisory Notice No. 15 ¶9, August 6, 1997 ("Advisory Notice 15").[4] The law makes no distinction

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[3] Relevant portions of the Act are reprinted on pages 2-3, *supra*.

[4] Advisory Notice 15, issued shortly after Act 199 went into effect, reads in relevant part as follows:

> 9. What kind of advertisements would be affected by the prohibition against advertisements in publications published by, for and in behalf of any educational institution?
>
> Advertisements which indicate the availability and/or prices of alcoholic beverages may not be contained in publications published by, for and in behalf of any

(continued...)

based on the age of the publisher or the intended audience. The prohibition is applicable even if the readership is predominantly (or even exclusively) over twenty-one, which is the legal drinking age in Pennsylvania. Consequently, the law applies in this case even though more than 75% of the population that reads *The Pitt News* is over the age of twenty-one.

On the other hand, Act 199 affects only a fraction of total alcohol-related advertising available to students on campus. For example, the law does not apply to commercial (non-student) publications. Advisory Notice 15. Therefore, the same ads that are banned in *The Pitt News* are readily available to all students in distribution racks containing free news weeklies, as well as coin operated boxes selling daily commercial papers like the *Pittsburgh Post Gazette* and the *Pittsburgh Tribune Review,* that are located adjacent to racks

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[4] (...continued)

> educational institution. Universities are considered educational institutions under this section. Thus, an advertisement in a college newspaper or college football program announcing the availability of alcoholic beverages would not be permissible. However, an advertisement merely indicating the name and address of a licensee or licensed premise, or an advertisement which indicates what nonalcoholic products may be acquired at the licensed premise making no reference to the availability of alcoholic beverages would be permissible. Further, advertisements in magazines, newspapers or other periodicals which have no connection to an educational institution other than the fact the school may subscribe to that particular newspaper are permissible. For example, an advertisement announcing the availability of alcoholic beverages is permitted in the *Philadelphia Inquirer* even if the University of Pennsylvania receives a subscription to the *Philadelphia Inquirer*. However, this same advertisement would not be permissible in the University of Pennsylvania school newspaper.

containing *The Pitt News*. Pet. App. 35a. Additionally, magazines containing more colorful and graphically stimulating alcohol-related advertisements, such as *Rolling Stone* and *Sports Illustrated*, are sold on Pitt's campus and delivered to students in the dormitories. *Id.* Cable television, which is available free of charge to Pitt students, carries beer advertisements. *Id.* Finally, numerous sandwich board-type advertisements of alcoholic drink specials are displayed on sidewalks next to the Pitt campus.

The Commonwealth further narrowed the scope of Act 199 during the course of this litigation by interpreting it to apply only to alcohol advertisements in education-related publications that are *paid for by liquor licensees and manufacturers* ("licensees")." Pet. App. 5a. For example, non-licensees like the Pitt Alumni Association or the "Class of '64" can advertise in *The Pitt News* the availability of drinks at University functions. Or licensees could (and did) distribute "poster-sized football schedules bearing beer brand advertising on them" at a university orientation session, so long as no consideration was paid. Pet. App. 36a.

The Effect of the Commonwealth's Enforcement of Act 199 on *The Pitt News*

In late 1997, the Commonwealth cited and fined at least two restaurants pursuant to Act 199 for purchasing advertisements mentioning alcohol in *The Pitt News*. Pet. App. 5a-6a. All of the alcoholic beverage-related advertisements received by *The Pitt News* came from area restaurants and bars. The Commonwealth's prosecution of restaurants advertising the sale of alcoholic beverages in *The Pitt News* led at least one advertiser to cancel his long-term advertising contract with the newspaper. *Id.* Virtually every business that placed advertisements mentioning alcohol with *The Pitt News* prior to the Commonwealth's enforcement of

Act 199 ceased buying such advertising space. Efforts by *The Pitt News* encouraging restaurants to continue purchasing advertisements that did not mention alcohol were unsuccessful. Pet. App. 33a-34a.

The Commonwealth's enforcement of Act 199 resulted in "a direct loss to *The Pitt News* of more than $17,000 in advertising revenue (not including lost revenue from new business)." Pet. App. 6a. The injury to *The Pitt News* was not, however, only economic. The "reduction in advertising caused *The Pitt News* to shorten its newspaper, thereby losing space in which to print student articles and photographs." *Id. The Pitt News* was forced to cancel publication of some student writers' longer stories (enterprise stories). Pet. App. 34a (n.24). The loss of revenue also "threaten[ed] the newspaper's ability to purchase new equipment and make renovations to its facilities, ... placed it in a competitive disadvantage in the marketplace ... and prevent[ed] the newspaper from giving students a real world experience." Pet. App. 6a, 34a-35a. "Moreover, the low profit margin of the newspaper will necessitate an increase in the rates charged for advertising in the newspaper, which will affect the newspaper's competitiveness in soliciting advertisements." Pet. App. 35a.

The effect of Act 199 on the amount of alcohol advertising available to students at the University of Pittsburgh, including minors, has been "minimal." Pet. App. 18a-19a. "The very same ads that are prohibited in *The Pitt News* are available to underage students through other newspapers displayed on campus news racks immediately adjacent to *The Pitt News* .... Beer and alcoholic beverage advertisements reach students under age twenty-one through a variety of magazines, radio and television advertisements, and sidewalk billboards, all of which are readily available both on and near the campus." Pet. App. 18a. In other

words, advertising prohibited by Act 199 "has been channeled to widely available non-student publications that ... are distributed at the same locations as [*The Pitt News*]." *Id.* The speech censored by Act 199 is "thus available to the entire University of Pittsburgh community [and] [t]he effect on third parties (readers and advertisers) is, therefore, minimal...." Pet. App. 18a-19a.

Procedural History

On April 6, 1999, *The Pitt News* filed suit in the United States District Court for the Western District of Pennsylvania under 42 U.S.C. §1983 against three Commonwealth officials challenging the constitutionality of Act 199. *The Pitt News* immediately moved for a preliminary injunction to enjoin enforcement of Act 199 against liquor licensees who advertise in the newspaper. An evidentiary hearing was held on April 28, 1999.

The only evidence presented at the hearing about the effectiveness of Act 199 came from *The Pitt News'* expert witness, Jon P. Nelson, Ph.D., a professor of economics for 30 years at Penn State University. Pet. App. 35a-36a. Professor Nelson's research, much of it funded by the U. S. Public Health Service, focused on government regulation, including the regulation of alcohol-related advertising, and the relationship between advertising restrictions and consumption. Professor Nelson testified that there is "no correlation between advertising and the increased consumption of alcohol." Pet. App. 36a. Advertising alters brand recognition and brand loyalty, but does not increase total market demand for the product. Moreover, partial bans on advertising, such as that enacted by Act 199, are particularly ineffective because they lead to displacement, namely, unregulated media increase their advertising. In Professor Nelson's expert opinion, Act 199 "will not be

effective in discouraging underage and binge drinking by college students in Pennsylvania." Pet. App. 36a.

The Commonwealth's sole witness at the hearing, the Director of Alcohol Education for the PLCB, Steven Schmidt, testified about numerous non-speech restricting measures that have been employed, or will in the future be employed, to combat underage and binge drinking. These include public education about the hazards of drinking, increased enforcement of existing criminal laws regulating underage drinking, and the provision of alcohol-free social and housing alternatives to students. Mr. Schmidt did not discredit Dr. Nelson's testimony. Indeed, on cross examination he acknowledged that a treatise he had proffered on direct examination supports Dr. Nelson's conclusion. He quoted from the treatise as follows:

> The body of research utilizing experimental methodology is the most well developed domain of alcohol advertising literature. Unfortunately, the diligent efforts of these investigators have not produced a conclusive answer to the basic question of whether alcohol ads increase consumption.

On July 1, 1999, the Honorable William Standish issued an Order denying *The Pitt News'* Motion for Preliminary Injunction. Pet. App. 45a. Although the court found that the Commonwealth's enforcement of Act 199 against liquor licensee advertisers caused injury to *The Pitt News* in the form of lost revenue, fewer news stories and competitive disadvantage in the marketplace, Pet. App. 34a-35a, it nevertheless ruled that *The Pitt News* did not have Article III standing to challenge the constitutionality of the law because the Commonwealth enforces the statute only against third parties, liquor licensee advertisers in education-related publications, and not against the publishing entities

themselves, such as *The Pitt News*. Pet. App. 39a-41a. The court also ruled that *The Pitt News* failed to prove "a First Amendment injury ... [because] [t]he harm that [*The Pitt News*] has suffered, and may suffer in the future, has been, and will be, economic, and the harm has not affected, and will not affect, the rights of *The Pitt News* to freedom of speech and of the press....", Pet. App. 44a. The judge also held that since the injury is economic, it is not irreparable. *Id.* On July 2, 1999, *The Pitt News* filed an appeal to the United States Court of Appeals for the Third Circuit.

On June 6, 2000, a unanimous panel of the Third Circuit affirmed the district court's denial of a preliminary injunction. The appeals court reversed the district court's decision on Article III standing, holding that *The Pitt News* had standing to challenge Act 199 because the law was the "cause-in-fact" of significant economic and other injury to *The Pitt News*. Pet. App. 9a. However, the court ruled that *The Pitt News* did not have third party standing to raise arguments on behalf of liquor licensees and readers. Pet. App. 11a-20a.

In assessing the First Amendment challenge, the appeals court acknowledged that the elimination of alcohol advertising in publications by, for or in behalf of educational institutions "was not only reasonably foreseeable when the Commonwealth decided to enact and enforce Act 199 . . . it was the very goal of the statute." Pet. App. 10a. The court also recognized that the Commonwealth's prosecution of licensees under Act 199 led to the cancellation of all advertising contracts with *The Pitt News*, "resulting in a direct loss to *The Pitt News* of more than $17,000 in advertising revenue." Pet. App. 6a. This in turn adversely affected the average length of the paper, the amount of space for news stories, and ability to operate competitively in the marketplace. *Id.*

Nevertheless, the court held that Act 199 "does not directly restrict the content of *The Pitt News*," Pet. App. 21a, and "although *The Pitt News* has no doubt felt an economic effect resulting from the enforcement of Act 199, this does not amount to a violation of its First Amendment rights." Pet. App. 23a. The court stated that, "[E]conomic loss ... does not constitute a first amendment injury." Pet. App. 22a.[5]

On June 19, 2000 *The Pitt News* petitioned the Third Circuit for rehearing *en banc*. The court denied the petition on August 17, 2000. Pet. App. 47a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES ISSUES OF EXCEPTIONAL NATIONAL IMPORTANCE INVOLVING AN

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[5] The court restated this proposition several times. *See, e.g.*, "The fact that *The Pitt News* has demonstrated a connection between the enforcement of Act 199 and the reduction in its advertising revenues from purveyors of alcoholic beverages, along with the resulting reduction in the length of publication, does not mean that one of its constitutionally protected interests has been injured. This amounts to nothing more than an incidental *economic effect* of a regulation aimed at closely regulated third parties." Pet. App. 21a; "[A]lthough it is true that enforcement of Act 199 has had the effect of driving away certain closely regulated businesses who previously advertised in *The Pitt News*, this does not in itself amount to a violation of *The Pitt News'* First Amendment rights"; *Id.*; "*The Pitt News* can claim only that Act 199 poses a threat to the newspaper's ability to receive information, not the newspaper's ability to publish the information. As we discussed above, harm to the ability to profit from publication is not a First Amendment harm." Pet. App. 23a n.13. Finally, in a bit of circular reasoning, the court concludes that, "Because its constitutional rights have not been infringed, any *economic effect* on the advertising revenue of *The Pitt News* is therefore incidental to the challenged regulation. Thus, although *The Pitt News* has no doubt felt an *economic effect* resulting from enforcement of Act 199, this does not amount to a violation of its First Amendment rights." Pet. App. 23a.

UNPRECEDENTED RESTRICTION ON NEWSPAPER PUBLICATION.

Petitioner is unaware of any case, at least in the Supreme Court, where a content-based law banning protected speech, in a targeted class of newspapers, has been upheld, much less exempted from First Amendment scrutiny.[6] The Third Circuit's unprecedented decision is not simply a mistake of marginal importance. If left undisturbed, it is likely to have a significant impact generally on freedom of speech and press, and in particular on small volume newspapers and publications. The Third Circuit's decision is, thus, deserving of plenary review by this Court.

The Third Circuit's holding is not only unprecedented, but inconsistent with at least four well established First Amendment doctrines: (1) financial constraints on speech can create a cognizable First Amendment injury; (2) laws burdening a small number of newspapers raise uniquely serious First Amendment concerns; (3) the commercial speech doctrine permits no exception for so-called socially controversial products or activities--the government must still prove that such laws directly and materially advance the asserted governmental interest; and (4) speech for adults cannot be significantly restricted in order to protect children. These issues are addressed in turn.

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[6] The term "law" refers to "*ex ante* prohibition[s] of certain kinds of speech," typically effected through legislation or administrative rulemaking, as opposed to "*ex post* (or *post hoc*) punishment of discrete, unforeseeable disturbances." *See, United States v. National Treasury Employees Union*, 513 U.S. 454, 481 (1995) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("*NTEU*"). The government's "burden is greater with respect to . . . statutory restriction[s] on expression than with respect to an isolated disciplinary action." *Id.* at 468.

A. THE THIRD CIRCUIT'S HOLDING THAT THE FINANCIAL IMPACT OF ACT 199 DOES NOT CREATE A COGNIZABLE FIRST AMENDMENT INJURY, DESPITE ITS UNDISPUTED IMPACT ON SPEECH, IS INCONSISTENT WITH DECISIONS OF THIS COURT.

This Court has recognized that "financial burden[s] operate as disincentives to speak; indeed, in many cases it will be impossible to discern in advance which type of regulation will be more costly to the speaker." *Simon and Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *See NTEU*, 513 U.S. at 468-69 (striking down ban on honoraria for outside speaking engagements by federal employees). The Third Circuit, by contrast, proceeded on the assumption that the state's efforts to regulate speech by reducing the income available to publishers are somehow outside the scope of legitimate First Amendment concern.

To be sure, newspapers are not exempt from economic regulation. *See Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983), and cases cited therein. But laws that intend to, and in fact do, restrict expression are qualitatively different than laws of general applicability that have an incidental effect on speech or press. *United States v. Playboy Entertainment Group, Inc.*, ___ U.S. ___, ___, 120 S. Ct. 1878, 1885 (2000) ("[l]aws *designed* or *intended* to suppress or restrict the expression of specific speakers contradict basic First Amendment principles") (emphasis added).[7] The Third

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[7] *See also, Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 658 (1994), citing *Regan v. Taxation with* (continued...)

Circuit's decision improperly obscures that fundamental distinction.

Significantly, the Third Circuit failed to distinguish *Simon & Schuster, supra*, a case that is directly on point. In *Simon & Schuster,* a publisher filed a First Amendment challenge to New York's Son of Sam law, which prohibited a person accused or convicted of a crime from making a profit on the crime. 502 U.S. at 108-110. The author's royalties from any publications about the crime were appropriated for victim restitution. *Id.* Despite the fact that the law was not enforced or directed against the publisher and the harm to the publisher was only economic, the Court declared the law unconstitutional. *Id.* at 118. The Third Circuit dismissed *Simon & Schuster* as "inconclusive" and "not dispositive," but did not explain why. Pet. App. 14a.

In fact, the challenge by *The Pitt News* is virtually indistinguishable from that brought by the publisher in *Simon & Schuster.* The Son of Sam law imposed a financial burden on a group of speakers regardless of where published, whereas Act 199 *bans* all expression by a group of speakers in a class of publications, thereby causing economic injury to the targeted publication. In both cases, the laws were intended to suppress expression.[8]

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[7] (...continued)
Representation of Washington, 461 U.S. 540, 548 (1983) (rejecting First Amendment challenge to differential tax treatment of veterans groups and other charitable organizations, but noting that the case would be different were there any "indication that the statute was *intended to suppress any ideas or any demonstration that it has had that effect"*) (parenthetical in original) (emphasis added).

[8] The Third Circuit noted that the elimination of alcohol advertising in (continued...)

This Court should grant certiorari to reaffirm the fundamental principle of *Simon & Schuster* that a financial burden can cause First Amendment injury and, when it does, First Amendment scrutiny is both necessary and appropriate.

B. THE COURT OF APPEALS' DECISION THAT ACT 199 DOES NOT INFRINGE *THE PITT NEWS'* FREE PRESS RIGHTS IS IN STARK CONFLICT WITH DECISIONS OF THIS COURT WHICH HOLD THAT CONTENT BASED PROHIBITIONS ON NEWSPAPERS, ESPECIALLY ONES TARGETING A SMALL GROUP OF NEWSPAPERS, PRESUMPTIVELY VIOLATE THE FIRST AMENDMENT.

Act 199 dictates the content of *The Pitt News*. The Commonwealth intended to prohibit commercial speech about alcohol in school newspapers, like *The Pitt News*, and it has succeeded in eliminating such speech from these newspapers. Whether enforced directly against the newspaper or indirectly against the advertisers, the effect is the same: the Commonwealth of Pennsylvania is dictating the content of *The Pitt News*.

The First Amendment does not allow this result, even for laudable goals. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974) ("A responsible press is an

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[8] (...continued)
school-related newspapers, like *The Pitt News*, "was not only reasonably foreseeable when the Commonwealth decided to enact and enforce Act 199, ... it was the very goal of the statute." Pet. App. 10a. This statement also dramatically undermines the court's repeated attempt to characterize the injury to *The Pitt News* as "incidental." If the effect of, and injury caused by, a law is foreseeable and intended, it cannot, *a fortiori*, be "incidental."

undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."). As Justice White observed, "[r]egardless of how beneficent-sounding the purposes of controlling the press might be, we prefer 'the power of reason as applied through public discussion' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Id.* at 259 (White, J., concurring) (citations omitted).

The First Amendment guarantees to the editors of *The Pitt News* the choice of content in the newspaper. That choice includes decisions about the inclusion, or exclusion, of news, commentary and advertising:

> A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials --- whether fair or unfair --- constitute the exercise of editorial control and judgment.

Tornillo, 418 U.S. at 258.[9] The Third Circuit's conclusion

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[9] The Supreme Court has recognized the importance of advertising revenue to the press. *See, Grosjean v. American Press Co.*, 297 U.S. 238, 244 (1936) (recognizing that tax on gross receipts from "advertisement ...operates as a restraint in a double sense" because curtailing revenue tends to restrict circulation); *Tornillo*, 418 U.S. at 255 ("The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence *advertisers — to assure financial success;* and second, the journalistic integrity of its editors and publishers.") (emphasis added)

(continued...)

that Act 199 does not interfere with freedom of the press is difficult to reconcile with this Court's historic skepticism of such governmental interference with editorial decision-making. "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.* at 258 (footnote omitted).

Moreover, the Commonwealth's selection of a class of newspapers for disfavored treatment compounds the constitutional harm and increases the importance of plenary review by this Court. "[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' . . . and so are always subject to at least some degree of heightened First Amendment scrutiny." *Turner Broadcasting System*, 512 U.S. at 640-41 (citations omitted).[10] *See also, Greater New Orleans Broadcasting Association, Inc. v. United States*, ___ U.S. ___, ___, 119 S. Ct. 1923, 1935 (1999) (hereafter "*GNOBA*") ("Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select

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[9] (...continued)
(citation omitted); *id.* at 256-57 (recognizing effect of forced reply law on "economic reality" of operating a newspaper).

[10] Laws of general applicability that incidentally affect the press, such as sales taxes, are "cause for little concern" because a government will not "destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of the constituency." *Minneapolis Star & Tribune*, 460 U.S. at 585. On the other hand, "the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment." *Id.* at 588. "That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* at 585.

among virtually identical speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment"). The newspaper tax cases are particularly relevant because they involve laws, like Act 199, which discriminate against a subclass of the media and impose an economic burden.[11]

The Third Circuit cavalierly dismissed these cases with the reasoning that "they involve taxes, not regulations on advertising, [and] they involve fees levied directly against a newspaper," whereas no taxes or fees have been levied against *the Pitt News*. Pet. App. 22a. This misses the point. The First Amendment harm is the singling out of a small number of publications for differential treatment. *Leathers*, 499 U.S. at 447-49; *Ragland*, 481 U.S. at 229.

This Court has noted its strong aversion to laws that target a small group of newspaper publishers: "we think that recognizing a power in the State not only to single out the press but also to tailor the [burden] so that it singles out a few members of the press presents such potential for abuse that no interest suggested by [the State] can justify the scheme." *Minneapolis Star*, 460 U.S. at 591-92. Without plenary review by this Court, the Third Circuit's decision raises the specter of such abuse.

C. THE COMMERCIAL SPEECH DOCTRINE

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[11] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (subjecting some publications to sales tax based on content violates First Amendment); *Minneapolis Star & Tribune*, 460 U.S. 575 (1983) (use tax on large publications places unconstitutional burden on freedom of the press); and *Grosjean v. American Press Co.*, 297 U.S. 238 (1936) (tax on certain newspapers acts as unconstitutional restraint on press). *Cf. Leathers v. Medlock*, 499 U.S. 439 (1991) (disparate tax based on medium not unconstitutional).

PERMITS NO EXCEPTION FOR SO-CALLED SOCIALLY CONTROVERSIAL PRODUCTS OR ACTIVITIES--THE GOVERNMENT MUST STILL PROVE THAT SUCH LAWS DIRECTLY AND MATERIALLY ADVANCE THE ASSERTED GOVERNMENTAL INTEREST.

The Third Circuit's implicit rejection of the requisite First Amendment analysis can be explained only by the fact that Act 199 involves commercial speech about a so-called "socially controversial" or "sin" product, namely, alcohol. Even though the decisions of the Supreme Court are clear that all restrictions on commercial advertising, including those involving socially controversial products and activities such as alcohol and gambling, are subject to the same rigorous analysis under the test in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980),[12] the lower federal courts have been resistant to this imperative.

Despite the seeming clarity of this Court's holdings, some lower courts have remained reluctant to scrutinize restrictions on advertisements about socially controversial products with the requisite rigor.[13] The Third Circuit's

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[12] This Court has refused to approve a more deferential standard for transactions that "promote[] socially harmful activities," such as alcohol consumption or gambling. *GNOBA*, ___ U.S. at ___, 119 S. Ct. at 1929. The *GNOBA* Court noted that the "vice activity" exception to the commercial speech, suggested in *Posadas de Puerto Rico Assoc. v. Tourism Co. Of Puerto Rico*, 478 U.S. 328 (1986), was rejected in *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996). *GNOBA*, ___ U.S. at ___, 119 S. Ct. at 1929. *See also*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995).

[13] *See, e.g., Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000) (continued...)

refusal in this case to apply any First Amendment analysis

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[13] (...continued)
(rejecting First Amendment challenge to restrictions on outdoor billboard and indoor point-of-sale tobacco advertising because, *inter alia*, "children deserve special solicitude in the First Amendment balance," and because "common sense" and "anecdotal evidence" support correlation between restriction and consumption); *Greater New Orleans Broadcasting System v. United States*, 69 F.3d 1296 (5th Cir. 1995) (rejecting First Amendment challenge to federal law restricting casino gambling advertisements), vacated and remanded for reconsideration in light of *44 Liquormart*, 519 U.S. 801 (1996), prior decision reaffirmed, 149 F.3d 334, 337 (holding that "after *44 Liquormart*, what level of proof is required to demonstrate that a particular commercial speech regulation directly advances the state's interest is unclear"), *reversed*, ___ U.S. ___, 119 S. Ct. 1923 *(1999); Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 328-29 (4th Cir. 1996) (on remand for reconsideration in light of *44 Liquormart*, reaffirming decision upholding outdoor advertising ban by purporting to distinguish *44 Liquormart* as limited to "narrowest" proposition "that keeping legal users of alcohol beverages ignorant of prices through a blanket ban on price advertising does not further any legitimate end"), *cert. denied*, 520 U.S. 1204 (1997); *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 101 F.3d 332 (4th Cir. 1996) (companion case), *cert. denied, 520* U.S. 1204 (1997); *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp. 2d 1225, 1228 (W.D. Wash. 1998) (questioning *44 Liquormart* because "no rationale was able to garner a majority"), rev'd based on federal preemption, 195 F.3d 1065 (9th Cir. 1999); *Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137 (N.J. 1998) (purporting to distinguish *44 Liquormart* as applicable only to total speech bans, and holding "the government does not have a heavy burden to satisfy" the second prong of the *Central Hudson* test). Some courts that have protected commercial speech have applied a less vigorous analysis than required by this Court. *See, e.g., Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1332 (9th Cir. 1997) (striking down ban on casino gambling advertising, but deferring to presumption that government's interest in discouraging participation in gambling is substantial enough to satisfy *Central Hudson*), *cert. denied*, 522 U.S. 1115 (1998); *Nordyke v. County of Santa Clara*, 993 F. Supp. 903 (N.D. Cal. 1996) (enjoining restriction, but finding that *44 Liquormart* did not preclude reliance on presumptions that speech restriction furthered governmental interest), *aff'd*, 110 F.3d 707 (9th Cir. 1997); *Rockwood v. City of Burlington*, 21 F. Supp. 2d. 411, 422-23 (D. Vt. 1998) (enjoining advertising restrictions but finding *44 Liquormart* gave "no clear statement of the test to apply....").

would appear to be a poignant example of this reluctance to carefully review and strike down commercial speech restrictions where the government has not met its burden of showing that the law "directly and materially advances the governmental interest." *GNOBA*, ___ U.S. at ___, 119 S. Ct. at 1932.

Act 199 could not survive scrutiny under the *Central Hudson* commercial speech test. The only record evidence about the correlation between an advertising ban and reduced consumption was presented by Dr. Nelson, who testified that there is no empirical data demonstrating a correlation between advertising and increased alcohol consumption. Pet. App. 36a. Advertising alters brand recognition and brand loyalty, but does not increase total market demand for the product. Additionally, he testified that partial bans on advertising, such as the one effected by Act 199, are particularly ineffective because they lead to displacement, namely, unregulated media increase their advertising.

The Third Circuit acknowledged that the effect of Act 199 on the totality of alcohol advertising reaching underage students was "minimal." Pet. App. 18a-19a. The advertising prohibited by Act 199 in *The Pitt News* "has been channeled to widely available non-student publications that ... are distributed at the same locations as [*The Pitt News*]"). Pet. App. 18a. Consequently, Act 199 is so underinclusive that it cannot possibly satisfy the third *Central Hudson* requirement that the law directly and materially advance its aim. Since Act 199 bans an even smaller proportion of total alcohol advertising than did the casino gambling statute in *GNOBA*, the flaw deemed fatal in that case exists in amplified form

here.[14]

While the Commonwealth cannot demonstrate that Act 199 advances the goal of reducing underage drinking, *The Pitt News* has demonstrated that the law inflicts a significant burden upon it. The harm extends beyond simply lost profits to reduced news space, cancellation of feature stories, operational handicaps and a competitive disadvantage in the marketplace. See p. 7-8, *supra*. The balance of equities in this case clearly favors *The Pitt News*.

D. THE APPEALS COURT'S DECISION UPHOLDING A LAW BANNING SPEECH IN

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[14] Nor can the Commonwealth satisfy the fourth prong of the *Central Hudson* test, which requires that the law be narrowly tailored and not "more extensive than is necessary to serve the [asserted] interest." 447 U.S. at 566. Where alternatives that do not restrict commercial speech exist, the regulation will be regarded as "more extensive than is necessary." *GNOBA*, ___ U.S. at ___, 119 S. Ct. at 1934; *44 Liquormart*, 517 U.S. at 486; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). The Supreme Court in *44 Liquormart* stressed the value of non-speech restricting educational alternatives over an advertising ban. *See* 517 U.S. at 507 (Stevens, J.); *Id.* at 528 (O'Connor, J., concurring in judgement).

In this case, Pennsylvania criminal law already prohibits the sale of alcohol to minors, the possession of alcohol by minors and the use of false identification to purchase such products. *See, e.g.*, 18 P.S. §6307 (misrepresentation of age to secure alcohol); 18 P.S. §6308 (purchase, consumption and possession of alcohol by minor); 18 P.S. §6310.1 (selling or furnishing alcohol to a minor); 18 P.S. §6310.2 and .3 (manufacture or carrying of false identification); 18 P.S. §6310.4 (civil restriction on motor vehicle operating privileges for conviction of underage drinking). Vigorous enforcement of these laws, which *directly* address the harm at issue, and public education measures, such as those already announced by the Commonwealth's witness, Steven Schmidt, will be far more effective than censorship of the press.

ORDER TO PROTECT CHILDREN IS IN TENSION WITH YET ANOTHER LINE OF SUPREME COURT CASES.

Finally, even if the Commonwealth could prove a sufficiently close nexus between Act 199 and the goal of reducing illegal underage drinking, the law is substantially overbroad. This Court's reasoning in *Reno v. American Civil Liberties Union* applies:

> It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. . . . But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population ... to ... only what is fit for children." . . . "Regardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching the mailbox simply cannot be limited to that which would be suitable for the sandbox."

521 U.S. 844, 875 (1997). (Internal citations omitted).

Act 199 applies to any education-related publications, regardless of the age of the publishers and readers. Consequently, the law restricts protected speech addressed to adults who may lawfully purchase and drink alcoholic beverages. Indeed, in this case approximately 75% of the university population that reads *The Pitt News* is over the age of 21.

The Commonwealth's decision to extend an advertising ban to all school-related publications, including those associated with colleges, universities, graduate schools and

adult education programs, renders it substantially overbroad.

> In order to deny minors access to potentially harmful speech, [Act 199] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Reno, 521 U.S. at 874. Similarly, in this case the Pennsylvania legislature has enacted an "unnecessarily broad suppression of speech addressed to adults."

CONCLUSION

For the foregoing reasons, the petition should be granted and the case set for briefing and argument.

Respectfully submitted,

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Dated: November 10, 2000

APPENDIX

Filed June 6, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3545

The Pitt News,
Appellant

v.

D. MICHAEL FISHER, in his capacity as Attorney General of the Commonwealth of Pennsylvania; MAJOR FRANCIS KOSCELNAK, in his capacity as Director, Bureau of Liquor Control Enforcement, Pennsylvania State Police; JOHN E. JONES, III, in his capacity as Chairman, Pennsylvania Liquor Control Board

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APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. No. 99-cv-529)
District Judge: The Honorable William L. Standish

ARGUED FEBRUARY 1, 2000
BEFORE: MANSMANN, NYGAARD, and RENDELL,
Circuit Judges.

(Filed June 6, 2000)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

I. INTRODUCTION

Appellant, *The Pitt News*, is a student-run newspaper at

the University of Pittsburgh. It sought to enjoin the enforcement of a 1996 amendment to the Commonwealth of Pennsylvania's Liquor Code, codified at 47 P.S. §4-498(e)(5) and known as "Act 199." This amendment provides criminal sanctions against businesses that advertise alcoholic beverages in newspapers and other materials "published by, for or in behalf of any educational institution." *Id. The Pitt News* sought declaratory and preliminary injunctive relief pursuant to 42 U.S.C.§ 1983, arguing that Act 199 violates the First Amendment.

The District Court denied the motion for a preliminary injunction, holding that *The Pitt News* lacked standing to bring this challenge because only advertisers, and not the newspaper itself, are subject to prosecution under Act 199. Because the District Court reasoned that *The Pitt News* felt only indirect economic effects resulting from a regulation aimed at third parties, it held that the newspaper did not suffer an injury to its own constitutionally protected interests, and therefore was not a proper party to bring this challenge.[15] *The Pitt News* appeals, arguing that its own First Amendment rights have been infringed by Act 199, which has had the effect of reducing its advertising revenue, and thereby the length of its publication. *The Pitt News* also claims that it may assert the constitutional rights of its former advertisers and its adult readers, neither of whom are parties to this litigation.

We hold that *The Pitt News* does have standing to argue that Act 199 infringes upon its own First Amendment rights.

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[15] The District Court also reasoned, in the alternative, that even if *The Pitt News* had standing to pursue the preliminary injunction, it had failed to establish that the enforcement of Act 199 had caused the newspaper irreparable injury, as would be required for preliminary injunctive relief. See Dist. Ct. Op. at 22, ¶. 30.

However, *The Pitt News* lacks standing to challenge Act 199 on behalf of these third parties. We will therefore proceed to the merits of the preliminary injunction only on the question of whether the economic effect felt by *The Pitt News* amounts to a violation of its own First Amendment rights. We hold that it does not, and will affirm.

II. JURISDICTION

The District Court exercised jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343, and 2201. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

III. FACTS and PROCEEDINGS

The Pitt News is a student-run newspaper, published under the supervision of the University of Pittsburgh. Students have full editorial control over the content of the newspaper, and it is entirely supported by advertising revenue. It is distributed free of charge in racks at 75 locations around the school campus. It is read by University of Pittsburgh students and faculty, as well as by members of the public at large. Approximately 75% of its readers are 21 years of age or older.

In 1996, the Commonwealth of Pennsylvania enacted the challenged amendments to the Pennsylvania Liquor Code known as Act 199, codified at 47 P.S. §4-498(e)(5). Act 199 provides that:

> (e) The following shall apply to all alcoholic beverage and malt beverage advertising:
>
> > (5) No advertisement shall be permitted, either directly or indirectly, in any booklet, program book,

yearbook, magazine, *newspaper*, periodical, brochure, circular or other similar publication *published by, for or in behalf of any educational institution.*

(g) For purposes of this subsection, the term "advertisement" shall mean *any advertising of alcoholic beverages* through the medium of radio broadcast, television broadcast, *newspapers*, periodicals or other publication, outdoor advertisement or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.

47 P.S. § 4-498 (1996) (emphasis added).

Violation of Act 199 is a misdemeanor. Violators may receive a fine of between $100 and $500 for a first offense, or imprisonment for up to three months. A second offense carries a mandatory minimum sentence of three months in jail. Although there is no legislative history explaining the purpose of Act 199, the Commonwealth asserts that it was designed to address problems of underage drinking on campus, as well as binge drinking on campus by both adults and minors.

Violations of Act 199 are investigated, and arrests are made, by the Bureau of Liquor Control Enforcement 4 ("BLCE") of the Pennsylvania State Police. However, the Pennsylvania Liquor Control Board ("LCB") issues interpretations of state liquor laws that are binding on the BLCE. The LCB has ruled that Act 199 can only be enforced against liquor licensees or manufacturers. Thus, a bar or restaurant that advertises drink specials or other information pertaining to alcoholic beverages in *The Pitt News* could be subject to criminal sanctions, but *The Pitt News* or its staff could never be prosecuted.

In December of 1997, a restaurant called the "Fuel & Fuddle," which placed alcohol-related advertisements in *The Pitt News*, was cited for violation of Act 199. This in turn led it to cancel its contract with *The Pitt News* . It is uncontested that this prosecution led other advertisers to cancel their contracts as well, resulting in a direct loss to *The Pitt News* of more than $17,000 in advertising revenue.[16]

Because *The Pitt News* follows a "50/50" format, whereby it must run equal proportions of advertising and text, this reduction in advertising caused *The Pitt News* to shorten its newspaper, thereby losing space in which to print student articles and photographs. Additionally, the loss of revenue threatens the newspaper's ability to purchase new equipment and make renovations to its facilities, and has placed it in a competitive disadvantage in the marketplace.

The Pitt News sued the defendant appellees, who are D. Michael Fisher, the Pennsylvania Attorney General; Major Francis Koscelnak, the Director of the BCLE; and John E. Jones, III, the Chairman of the LCB. *The Pitt News* sought declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that enforcement of Act 199 violates its rights and/or those of its advertisers and adult readers under the First Amendment. The District Court held a hearing on the motion for a preliminary injunction, and ruled that *The Pitt News* did not have sufficient standing to bring this suit. The District Court reasoned that *The Pitt News* could not make out a violation of its own First Amendment rights:

> The harm that [*The Pitt News*] has suffered, and suffer in the future, has been, and will be, economic, and the harm has not affected, and will not affect,

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[16] This amount does not include potential lost revenue from new business.

> the rights of *The Pitt News* to freedom of speech or of the press. Because the injury suffered, or to be suffered, by *The Pitt News* arising from the enforcement of Section 4-498(e)(5) of Act 199 is not, and will not be, a concrete and particularized invasion of a legally protected interest of *The Pitt News*, but, rather, an indirect economic injury, *The Pitt News* has failed to establish its standing to assert its request for a preliminary injunction.

Dist. Ct. Op. at 21-22, ¶29.

IV. DISCUSSION

Standing consists of both a "case or controversy" requirement stemming from Article III, Section 2 of the Constitution, and a subconstitutional "prudential" element. To demonstrate Article III standing, plaintiffs must demonstrate that they have suffered an injury-in-fact, that the injury is causally connected and traceable to an action of the defendant, and that it is redressable. *See Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 152-53 (3d Cir. 1999). Even when this constitutional minimum has been met, judicially created prudential limitations may defeat a party's standing to maintain a suit. *See Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 75 (3d Cir. 1998).

As discussed *infra*, we conclude that *The Pitt News* has demonstrated Article III standing to bring this suit on its own behalf. However, prudential limitations prevent it from asserting the constitutional rights of its former advertisers or current adult readers, who are not parties to this case.

A. Article III Standing

1. Injury in Fact

To have Article III standing, *The Pitt News* must first demonstrate that it has suffered an injury-in-fact. This 6 injury must be concrete and particularized,[17] and actual or imminent, as opposed to conjectural or hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). "[T]he injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560-61 and n.1, 112 S. Ct. at 2136 and n.1.

The Pitt News has demonstrated a personal stake in the outcome of this litigation. It has lost approximately $17,000 in advertising revenue as a result of the enforcement of Act 199 against one of its advertisers. *The Pitt News* claims that this amounts to a violation of its First Amendment rights. As discussed in sub-section C, *infra*, we disagree that *The Pitt News*' First Amendment rights have been violated. However, our determination of the likelihood of success on the merits of the case is a separate inquiry from the threshold issue of Article III standing. To demonstrate its standing to sue, a plaintiff must only *allege* that they have suffered sufficient injury to comply with Article III's "case or controversy" requirement. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 329- 30, 119 S. Ct. 765, 772-73, 142 L. Ed. 2d 797 (1999); *Secretary of State of Maryland v. Joseph Munson Co., Inc.*, 467 U.S. 947, 958-59,

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[17] This Article III injury requirement is related to the prudential rule, discussed *infra*, that litigants should not assert the rights of third parties unless they have a "sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy." *Singleton v. Wulff*, 428 U.S. 106, 112 96 S. Ct. 2868, 2873, 49 L. Ed. 2d 826 (1976). These two requirements are thus "not completely severable." *Secretary of State of Maryland v. Joseph Munson Co., Inc.*, 467 U.S. 947, 955-56 n.5, 104 S. Ct. 2839, 2846 n.5, 81 L. Ed. 2d 947 (1984).

104 S. Ct. 2839, 2848, 81 L. Ed. 2d 947 (1984) (question of whether challenged statute was substantially overbroad was question better left for merits, not resolved as part of standing inquiry). The threshold standing inquiry is analogous in this regard to the threshold question of Article III subject matter jurisdiction, where the failure to state a claim upon which relief can be granted does not mean that federal question jurisdiction is lacking. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d 210 (1998); *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946). *The Pitt News* has alleged a sufficiently personal injury to satisfy the "injury in fact" requirement of Article III standing.

2. Traceability

Next, to determine whether *The Pitt News* has Article III standing we must ascertain whether the alleged injury-in- fact is causally connected and traceable to an action of the defendants. *See Doe v. National Bd. of Med. Exam'rs*, 199 F.3d 146, 152-53 (3d Cir. 1999). One could argue that the injury alleged by *The Pitt News* is not fairly traceable to the enforcement of Act 199, because the harm felt by the newspaper results from the independent acts of third parties. *The Pitt News* has lost revenue because its advertisers decided to stop paying to place advertisements in the newspaper. Therefore, arguably, any harm to *The Pitt News* was caused by the independent action of these third- party advertisers, and did not result from the enforcement of Act 199 itself.

We reject this argument, and conclude that the injury alleged by *The Pitt News* is fairly traceable to the enforcement of Act 199. To analogize this situation to a familiar example in tort law, the enforcement of Act 199 was the cause-in-fact of the financial impact felt by *The Pitt*

News. 'But for' this enforcement, its advertisers would not have canceled their contracts. *See Murray v. Fairbanks Morse*, 610 F.2d 149, 160 (3d Cir. 1979) (distinguishing between causation-in-fact and proximate cause based on foreseeability and intervening acts). This result was not only reasonably foreseeable when the Commonwealth decided to enact and enforce Act 199, *see id.*, it was the very goal of the statute.

Bennett v. Spear, 520 U.S. 154, 169, 117 S. Ct. 1154, 1164, 137 L. Ed. 2d 281 (1997), supports the conclusion that *The Pitt News*' alleged injury meets the traceability prong of the standing inquiry. In *Bennett*, the plaintiff sued one government agency, 'Agency A,' which had coerced a second agency, 'Agency B,' into enacting certain regulations that injured the plaintiff. The Court held that the plaintiff 8 had standing to sue 'Agency A,' even though it did not actually enact the regulations at issue. The rationale was that the plaintiff's injuries were directly traceable to the actions of 'Agency A,' because 'Agency B' would not have enacted the challenged regulation 'but for' the actions of 'Agency A.' Following this logic, *The Pitt News*' alleged injury is, for standing purposes, also fairly traceable to the acts of the defendant-appellees.[18]

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[18] Of course our conclusion regarding traceability in the standing context is not the same as a determination that the alleged injury flows from an actual violation of *The Pitt News'* First Amendment rights. A party may demonstrate standing to litigate a claim even if they fail to make out a constitutional violation on the merits. There is thus no inconsistency between our holding that the injury to *The Pitt News* was fairly traceable to the enactment and enforcement of Act 199 for standing purposes, and our discussion, *infra*, holding that *The Pitt News* suffered only an indirect injury that did not amount to a violation of its First Amendment rights on the merits.

3. Redressability

Finally, the plaintiff only has Article III standing if "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, ___ U.S. ___, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000). On these facts, it is not "merely speculative" that *The Pitt News* will see a dramatic increase in its advertising revenues if Act 199 is struck down as unconstitutional. Enforcement of Act 199 clearly led *The Pitt News*' advertisers to cancel their contracts with the student newspaper. Although these advertisers have since utilized other methods for distributing their message to their target audience, we may assume based on the past revenues generated by *The Pitt News* and the sudden drop- off in those revenues after the enforcement of Act 199 against one of its advertisers, that its past advertisers and/or new businesses are likely to continue to advertise alcoholic beverages in *The Pitt News* if it becomes legal for them to do so.

The Pitt News therefore has Article III standing to bring its claim, at least to the extent that its own rights are concerned, because it has made sufficient allegations that it suffered an injury-in-fact that is fairly traceable to the actions of the defendant-appellees, and that is likely to be redressable by an action of this Court.

B. Prudential Standing

We turn now to the prudential factors that affect *The Pitt News*' ability to raise the rights of third parties. In addition to asserting its own rights, *The Pitt News* also attempts to argue that enforcement of Act 199 violates the First Amendment rights of its former advertisers, who are subject to the provisions of the statute, as well as those of its adult

readers.[19] However, the federal courts adhere to a prudential rule that "[o]rdinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S. Ct. 2868, 2874, 49 L. Ed. 2d 826 (1976) (quoting *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S. Ct. 1031, 1034, 97 L. Ed. 1586 (1953)). We apply this prudential rule against third party standing[20] even when the requirements of Article III have been met, to "avoid deciding questions of broad social import . . . [and] to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99- 100, 99 S. Ct. 1601, 1608, 60 L. Ed. 2d 66 (1979).

There is, however, a narrow exception to the prohibition on third party standing, provided three criteria are satisfied. First, the plaintiff must have suffered an actual injury, although not necessarily one to its own legally protected interests. *See Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71, 113 L. Ed. 2d 411 (1991). Second, the plaintiff must have a close enough relationship with the party whose rights he or she is asserting,"thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute" and ensuring that the plaintiff will be an effective advocate. *Id.* Third, "there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.*

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[19] Although it can be difficult to draw a distinction between the two, the First Amendment rights of both speakers and listeners can be implicated by government regulation. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-75, 117 S. Ct. 2329, 2346, 138 L. Ed. 2d 874 (1997) (Government's legitimate interest in protecting children "does not justify an unnecessarily broad suppression of speech addressed to adults.").

[20] This prudential rule is also referred to as the rule against bringing *jus tertii* claims. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804, 105 S. Ct. 2965, 2970, 86 L. Ed. 2d 628 (1985).

Thus, a plaintiff who meets all these criteria, but who would otherwise lack Article III standing to sue because his or her own legally protected rights were not injured, may assert the rights of a third party.[21] The impact felt by such a plaintiff, combined with the nexus between the plaintiff's injury and the rights of the third party, are sufficient to satisfy both Article III's constitutional requirements and judicially-created prudential concerns.

Although *The Pitt News* has not suffered an injury to its own constitutionally protected interests, it has nonetheless sustained a sufficient injury-in-fact, as a result of its lost advertising revenue, to satisfy the exception's first criterion. It also has a sufficiently close relationship with the third party advertisers to satisfy the exception's second criterion, because of the contractual relationship that existed between them.[22] The problem with *The Pitt News*' attempt to assert the

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[21] *See, e.g., Craig v. Boren* , 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (beer vendor given standing to challenge statute that prevented males between the age of 18 and 21 from buying beer, after an original plaintiff in case turned 21 -- it would presumably be difficult for any plaintiff to litigate up to the Supreme Court within the three years before his case became moot); *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) (doctor could challenge regulation on abortion on behalf of pregnant women when his fees were at stake -- it would be virtually impossible for any pregnant woman to litigate her case to the Supreme Court before it became moot); *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) (NAACP can assert right to privacy of its members to avoid necessity of their appearing in court, and therefore losing the right they were trying to assert); *Barrows v. Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953) (allowing white property owner to challenge racially restrictive covenant on land because African-American attempting to buy land from him would not have standing to make such a challenge).

[22] We will assume that *The Pitt News* also has a sufficiently close connection with its readers to satisfy this criterion as well. Because we conclude that *The Pitt News* may not assert third party standing in this case, we need not decide this question.

rights of third parties lies with the final criterion. *The Pitt News* has not demonstrated that the advertisers actually subject to Act 199, or its adult readers, have any impediment to bringing their own suit to challenge the statute. In most cases, we would therefore conclude at this point that the plaintiff could not assert third party standing. However, we must consider whether the assertion of First Amendment rights in this case requires us to relax this third criterion.

The Pitt News raises *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) to support its argument that First Amendment challenges are not subject to the *jus tertii* prudential rule. In *Simon & Schuster*, a book publisher challenged a statute affecting profits from books written by perpetrators about their crimes. Publishers were required by the statute at issue to place the author's share of profits from these books into escrow. The escrow fund was then used to pay off perpetrators' civil liability to their victims. *The Pitt News* argues that because the publisher in that case had standing to sue, it should as well. However, the Supreme Court avoided addressing the standing issue in *Simon & Schuster*, noting that whether the proper litigant was the publisher or the author, the results would be the same. *See Simon & Schuster, Inc.*, 502 U.S. at 116, 112 S. Ct. at 508. The case is therefore inconclusive. Because *Simon & Schuster* is not dispositive, we will turn instead to a line of authority specifically addressing the availability of third party standing when First Amendment rights are at stake.[23]

In *Secretary of State of Maryland v. Joseph Munson Co., Inc.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 947 (1984),

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[23] Although neither party discussed this line of authority, we find it helpful to our analysis.

the plaintiff was a professional, for-profit fund- raising company. Maryland enacted a statute prohibiting charitable organizations from paying or agreeing to pay more than 25% of the proceeds from fundraising events as expenses.[24] Munson claimed that it regularly charged more than 25% of the gross for the fund-raising events it organized on behalf of its clients. Munson stated in its complaint that its customers were reluctant to do business with it as a result of the enactment of the statute, and also that the Secretary of State told Munson that the company would be subject to prosecution under the statute. *See Joseph Munson Co., Inc.*, 467 U.S. at 954-55, 104 S. Ct. at 2845-46. The Supreme Court held that *Munson* did have standing to assert the First Amendment rights of its clients, because the company suffered an injury-in-fact that complied with Article III's standing requirements, and because Munson could adequately frame the issues regarding the rights of these third parties.

In discussing standing, the *Munson* Court noted the general prudential limitation that plaintiffs generally cannot assert "the legal rights or interests of third parties." *Joseph Munson Co., Inc.*, 467 U.S. at 955, 104 S. Ct. at 2846 (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975)) (additional citations omitted). However, the Court concluded that when a plaintiff attempts to challenge a statute as being an overbroad restriction on First Amendment rights, the requirement that an impediment exist to the third party asserting his or her own rights should be relaxed:

> Even where a First Amendment challenge could be brought by one actually engaged in protected activity,

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[24] An exception was made if a charitable organization was otherwise unable to raise funds.

> there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. "Litigants, therefore, are permitted to challenge a statute [in such a case] not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Joseph Munson Co., Inc., 467 U.S. at 956-57, 104 S. Ct. at 2847 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973) (involving class action challenge to state statute severely curtailing the types of political activity in which state employees could engage)). *Munson* thus holds that the prudential standards governing the assertion of third party rights may be relaxed in the First Amendment context, when the Court determines that society's interest in preventing the chilling of free speech outweighs the normal prudential concerns that prohibit *jus tertii* claims.

The fact that prudential standards may be relaxed in appropriate cases, however, does not mean we must relax them in this case. "In determining whether a litigant should be able to assert third-party rights, a crucial factor is `the impact of the litigation on the third-party interests.' " *Joseph Munson Co., Inc.*, 467 U.S. at 956-57 n.7, 104 S. Ct. at 2847 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 445, 92 S. Ct. 1029, 1034, 31 L. Ed. 2d 349 (1972)). To circumvent the rule against third party standing, the plaintiff must also demonstrate more than a mere interference with the third

party's rights. "Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it *substantially abridges* the First Amendment rights of other parties not before the court." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S. Ct. 826, 834, 63 L. Ed. 2d 73 (1980) (emphasis added) (challenging ordinance prohibiting all door-to-door or on-street solicitation of funds for charities failing to use at least 75% of their proceeds for charitable purposes).

Munson, *Eisenstadt*, and *Village of Schaumburg* all involved substantial threats to free speech, such that third parties were forced to forego their rights entirely, or else face criminal prosecution to vindicate them. Thus, application of the prudential rule against third party standing "would have [had] an intolerable, inhibitory effect on freedom of speech" in those cases. *Eisenstadt v. Baird*, 405 U.S. 438, 445 n.5, 92 S. Ct. 1029, 1034, 31 L. Ed. 2d 349 (1972). They also involved allegations of substantial overbreadth, such that parties who should not have had 14 their freedom of speech restricted nonetheless found that freedom chilled. *See Harris v. Evans*, 20 F.3d 1118, 1122 n.5 (11th Cir. 1994), *cert. denied*, 513 U.S. 1045, 115 S. Ct. 641, 130 L. Ed. 2d 546 ("The Supreme Court has recognized that, in certain cases, the risk that a third party's free speech may be 'chilled' by an overbroad statute or ordinance may warrant the grant of standing to a party whose speech is not protected by the First Amendment.").

When we look to the effect of Act 199 on the third parties in the present case, however, as we are required to do by *Joseph Munson Co., Inc.*, 467 U.S. at 956-57 n.7, 104 S. Ct. at 2847, we do not see the sort of dangers that have warranted relaxing prudential requirements in the cases cited above. *The Pitt News* has not demonstrated, as part of its

burden in establishing its standing to assert third party rights, that its former advertisers are likely to have their speech chilled by the enactment of Act 199, or that there is a risk they will forego their constitutionally protected rights. Nor has it demonstrated that adult members of the University of Pittsburgh community will find their access to alcohol-related advertisements diluted. In fact, *The Pitt News* admits that despite enforcement of Act 199, its former advertisers have had an easy time delivering their messages to students and staff of all ages.

> [T]he very same ads that are prohibited in *The Pitt News* are available to underage students through other newspapers displayed on campus news racks immediately adjacent to *The Pitt News*. . . . Beer and alcoholic beverage advertisements reach students under age twenty-one through a variety of magazines, radio and television advertisements, and sidewalk billboards, all of which are readily available both on and near the campus.

Appellant's Br. at 39-40.

The third parties in question have thus not suffered substantial abridgement of their free speech rights. Instead, that speech has been channeled to widely available non-student publications that *The Pitt News* admits are distributed at the same locations as its own newspapers. The content of that speech is thus available to the entire 15 University of Pittsburgh community. The effect on third parties, therefore, is minimal in this case.[25] Because we must balance the effect

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[25] We note that even the *"Fuel & Fuddle,"* which was actually prosecuted under Act 199, did not find it worthwhile to challenge its constitutionality. This fact is of course hardly dispositive, as many factors go into a decision whether or not to litigate.

of the challenged statute on third parties against the importance of the prudential rule prohibiting third party standing, we therefore conclude that *The Pitt News* does not qualify for an exception to this prudential standing rule.[26]

That Act 199 has not had a sufficiently noticeable effect on free speech to warrant third party standing should not be surprising. As the Supreme Court has recognized,"[f]or the purposes of applying the overbreadth doctrine . . . it remains relevant to distinguish between commercial and noncommercial speech." *Village of Schaumburg* , 444 U.S. at 632 n.7, 100 S. Ct. at 834.

> [T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. . . . [T]here are `commonsense differences' between commercial speech and other varieties. Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. Moreover, concerns for uncertainty in determining the scope of protection are reduced. . . Since overbreadth has been described by this Court as `strong medicine,' which `has been employed . . . sparingly and only as a last resort,' *Broadrick v. Oklahoma*, 413 U.S., at 613, 93 S. Ct., at 2916, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective.

Bates v. State Bar of Arizona, 433 U.S 350, 380-81, 97 S. Ct. 2691, 2707-08, 53 L. Ed. 2d 810 (1977) (citations omitted).

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[26] In reaching this conclusion with regard to third party standing, we of course reach no conclusions regarding whether Act 199 may be successfully challenged on other constitutional grounds.

See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 564 n.6, 100 S. Ct. 2343, 2350, 65 L. Ed. 2d 341 ("[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.' "). The same reasoning that underlies the limitation of the application of an overbreadth challenge in the commercial context also supports our limitation on third party standing in this context.

C. Likelihood *The Pitt News*' First Amendment Claim Will Succeed on the Merits

We now proceed to determine whether *The Pitt News* has demonstrated that it is entitled to preliminary injunctive relief for the indirect economic loss it alleges. In ruling on a motion for a preliminary injunction, the District Court must consider the following factors, and issue an injunction only if all four factors favor preliminary relief: (a) the likelihood that the plaintiff will prevail on the merits of its claim at the final hearing; (b) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (c) the extent to which the defendant would suffer irreparable harm if the preliminary injunction is issued; and (d) the public interest. *See New Jersey Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995). The District Court concluded that even if *The Pitt News* had standing, the newspaper would not be entitled to a preliminary injunction because it had not shown irreparable harm. We agree that *The Pitt News* is not entitled to preliminary injunctive relief. We need not reach the question of irreparable harm, however, because we conclude that *The Pitt News* has not shown a likelihood of success on the merits of its claim.

The Pitt News claims that its First Amendment rights have been injured by the enforcement of Act 199, even

though Section 4-498(e)(5) can only be enforced against advertisers. *The Pitt News* claims that although it cannot be prosecuted under the Act, the loss of advertising revenue resulting from the Act's enforcement has reduced the amount of space it has available to publish articles and photographs, thereby interfering with its right to freedom of the press.

We disagree. The fact that *The Pitt News* has demonstrated a connection between the enforcement of Act 199 and the reduction in its advertising revenues from purveyors of alcoholic beverages, along with the resulting reduction in the length of its publication, does not mean that one of its constitutionally protected interests has been injured. This amounts to nothing more than an incidental economic effect of a regulation aimed at closely regulated third parties. Act 199 does not directly restrict the content of *The Pitt News*. It is free to seek advertising from a myriad of sources, including purveyors of alcoholic beverages, so long as those beverages are not mentioned in the advertisements. Additionally, according to the LCB, *The Pitt News* could, for instance, contact area bars, find out what their nightly drink specials are, and publish a weekly listing of goings-on about town -- so long as *The Pitt News* did not receive any consideration for doing so. There is thus no direct limitation on the freedom of *The Pitt News* to publish alcohol-related information.

The fact that *The Pitt News* is a newspaper does not give it a constitutional right to a certain level of profitability, or even to stay in business at all. *The Pitt News* "proceeds on the erroneous premise that it has a constitutional right not only to speak, but to speak profitably." *AMSAT Cable Ltd. v. Cablevision of Connecticut*, 6 F.3d 867, 871 (2d Cir. 1993) (holding that although content of cable television transmissions has First Amendment protection, government regulation that has incidental economic effect of forcing cable

operator out of business does not injure operator's First Amendment rights). "[E]conomic loss . .. does not constitute a first amendment injury. 'The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of [an] ordinance upon freedom of expression.' " *Warner Cable Communications, Inc. v. City of Niceville,* 911 F.2d 634, 638 (11th Cir. 1990), *cert. denied,* 501 U.S. 1222, 111 S. Ct. 2839, 115 L. Ed. 2d 1007 (1991) (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78, 96 S. Ct. 2440, 2456, 49 L. Ed. 2d 310 (1976) (Powell, J., concurring)). Thus, although it is true that the enforcement of Act 199 has had the effect of driving away certain closely regulated businesses who previously advertised in The Pitt 18 News, this does not in itself amount to a violation of *The Pitt News*' First Amendment rights.

In an effort to avoid this reasoning, *The Pitt News* advances a "selective tax" argument. It points to a line of cases holding that it is unconstitutional to impose selective taxes or other financial burdens on newspapers because of their content. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987) (placing sales tax on certain publications based on their content violates First Amendment). Selective tax cases are distinguishable for two reasons. First, they involve taxes, not regulations on advertising. Second, they involve fees levied directly against a newspaper. In the present case, no taxes or fees have been levied against *The Pitt News*. Further, as discussed above, the content of *The Pitt News* is not directly regulated or penalized by Act 199. Therefore, this selective tax argument is unavailing.

Because its constitutional rights have not been infringed, any economic effect on the advertising revenue of *The Pitt News* is therefore incidental to the challenged regulation. Thus, although *The Pitt News* has no doubt felt an economic

effect resulting from the enforcement of Act 199, this does not amount to a violation of its First Amendment rights.[27]

V. CONCLUSION

For the reasons stated above, Appellant, *The Pitt News*, has standing to challenge 47 P.S. § 4-498(e)(5) on its own behalf, but lacks standing to challenge it on behalf of its former advertisers or its adult readers. We therefore do not reach the merits of its constitutional challenges regarding those third parties. As for *The Pitt News*' own First Amendment challenge, we conclude that the newspaper has not shown a likelihood of succeeding on the merits of its claim that the enforcement of 47 P.S. § 4-498(e)(5) has violated its right to free speech.

A True Copy:

Teste: *Clerk of the United States Court of Appeals for the Third Circuit*

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[27] We recognize that portions of *The Pitt News'* complaint can be construed as asserting an additional right, the newspaper's right to determine its own advertising content. *See* Complaint ¶¶. 1, 26, 35, 49. It is true that newspapers do have a legitimate First Amendment interest in their advertising content as well as their editorial content, *see Bigelow v. Virginia*, 421 U.S. 809, 825, 95 S. Ct. 2222, 2234, 44 L. Ed. 2d 600 (1975); however, *The Pitt News* has not demonstrated that Act 199 poses a concrete threat to that right. Because the LCB has ruled that Act 199 can only be enforced against liquor licensees or manufacturers, Act 199 cannot prevent *The Pitt News* from publishing information about the prices and availability of liquor. *See* A. at 236, 262-64, 290 (Deposition of Faith S. Diehl, Chief Counsel of the LCB). Therefore, *The Pitt News* can claim only that Act 199 poses a threat to the newspaper's ability *to receive compensation* for publishing this information, not the newspaper's ability to *publish* the information. As we discussed above, harm to the ability to profit from publication is not a First Amendment harm.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE PITT NEWS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.99-529
	)	
D. MICHAEL FISHER, in his capacity as Attorney General of the Commonwealth of Pennsylvania, MAJOR FRANCIS KOSCELNAK, in his capacity as Director of the Bureau of Liquor Control Enforcement, Pennsylvania State Police, and JOHN E. JONES, III, in his capacity as Chairman of the Pennsylvania Liquor Control Board,	)	
	)	
Defendants.	)	

ADJUDICATION

I

In this civil action, plaintiff, *The Pitt News*, seeks declaratory and injunctive relief against defendants, D. Michael Fisher, Attorney General of the Commonwealth of Pennsylvania, Major Francis Koscelnak, Director of the Bureau of Liquor Control Enforcement of the Pennsylvania State Police, and John E. Jones, III, Chairman of the Pennsylvania Liquor Control Board, under 42 U.S.C. § 1983, arising out of the enforcement of Section 4-498(e)(5) of

Pennsylvania's Liquor Code, 47 P.S. § 4-498(e)(5), which prohibits alcohol-related advertisements "by, for or in behalf of any educational institution." *The Pitt News* claims that such enforcement violates its rights under the First Amendment to the United States Constitution applicable to the Commonwealth of Pennsylvania through the Fourteenth Amendment. After a hearing on the motion of *The Pitt News* for preliminary injunctive relief, the court makes the following findings of fact and conclusions of law. For the reasons stated therein, the motion will be denied.

Findings of Fact

1. *The Pitt News* is a certified student organization at the University of Pittsburgh (Pitt), which publishes a newspaper on each weekday during the school year and on a weekly basis during the summer. *The Pitt News* also publishes a magazine called *Impulse*. *Impulse* is published on Fridays during the school year, and it becomes part of the weekly edition of *The Pitt News* during the summer.

2. Defendant D. Michael Fisher is the Attorney General of the Commonwealth of Pennsylvania, and he is authorized and empowered to enforce state statutes. At all relevant times, defendant Fisher was acting under color of law. He is being sued in his official capacity.

3. Defendant Francis Koscelnak is the Director of the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (the BLCE), which is statutorily charged with the responsibility of enforcing Pennsylvania's Liquor Code, 47 P.S. §§ 1-101 *et seq.* At all relevant times, defendant Koscelnak was acting under color of law. He is being sued in his official capacity.

4. Defendant John E. Jones, III is the Chairman of Pennsylvania's Liquor Control Board (the LCB), which is responsible for (a) issuing liquor licenses in the Commonwealth of Pennsylvania; (b) promulgating regulations under the Liquor Code; and (c) interpreting the

Liquor Code and its regulations through the issuance of advisory opinions. At all relevant times, defendant Jones was acting under color of law. He is being sued in his official capacity.

5. On December 20, 1996, the legislature of the Commonwealth of Pennsylvania amended Pennsylvania's Liquor Code. The amendment, which is commonly referred to as "Act 199," was signed by Governor Ridge and went into effect sixty (60) days later. Act 199 is codified at 47 P.S. § 4-498.

6. Act 199 provides in relevant part:

> **§ 4-498. Unlawful advertising**
>
> (a) Manufacturers, wholesalers, retailers and shippers, whether from outside or inside this Commonwealth, and any licensee under this act are permitted to advertise their products and prices in this Commonwealth. All advertisements shall be subject to all Federal and State laws and regulations.
>
> * * *
>
> (e) The following shall apply to all alcoholic beverage and malt beverage advertising:
>
> * * *
>
> (5) No advertisement shall be permitted, either directly or indirectly, in any booklet, program book, yearbook, magazine, newspaper, periodical, brochure, circular or other similar publication published by, for or in behalf of any educational institution.
>
> * * *
>
> (g) For purposes of this subsection, the term "**advertisement**" shall mean any advertising of

alcoholic beverages through the medium of radio broadcast, television broadcast, newspapers, periodicals or other publication, outdoor advertisement or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.

47 P.S. § 4-498.

7. It was apparent from the testimony and evidence offered by the parties at the preliminary injunction hearing that one of the purposes of Act 199 is to combat the problems of underage drinking and "binge" drinking by individuals of all ages on college campuses.[28] However, there is no legislative history to assist in the interpretation of the scope and proper application of Act 199.

8. On August 6, 1997, the LCB issued Advisory Notice No. 15 in connection with Act 199, which provides in relevant part:

* *. *

9. What kind of advertisements would be affected by the prohibition against advertisements in publications published

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[28] With respect to the issue of underage drinking, Pitt's latest census figures from the Fall of 1997 show that there were 25,461 students at Pitt, including full-time, part-time, graduate and undergraduate students. Of those students, approximately 67.5% were over the age of 21, the legal drinking age in Pennsylvania. In addition, there were 7,742 faculty members and staff at Pitt in the Fall of 1997, and 99.9% of those individuals were over the age of 21. Consequently, 75.1% of Pitt's total population in the Fall of 1997 was over the age of 21. (Complaint, para. 22, Answer, para. 22). As to the problem of "binge" drinking, according to the 1998-1999 Report of Pitt's Alcohol Abuse and Advisory Committee, five drinks by men during one drinking session and four drinks by women during one drinking session constitutes "binge" drinking. (Exhibit A).

by, for and in behalf of any educational institution?

Advertisements which indicate the availability and/or price of alcoholic beverages may not be contained in publications published by, for and in behalf of any educational institution. Universities are considered educational institutions under this section. Thus, an advertisement in a college newspaper or college football program announcing the availability of alcoholic beverages would not be permissible. However, an advertisement merely indicating the name and address of a licensee or licensed premise, or an advertisement which indicates what nonalcoholic products may be acquired at the licensed premise making no reference to the availability of alcoholic beverages would be permissible. Further, advertisements in magazines, newspapers or other periodicals which have no connection to an educational institution other than the fact the school may subscribe to that particular newspaper are permissible. For example, an advertisement announcing the availability of alcoholic beverages is permitted in the **Philadelphia Inquirer** even if the University of Pennsylvania receives a subscription to the **Philadelphia Inquirer**. However, this same advertisement would not be permissible in the University of Pennsylvania's school newspaper.

* * *

(Complaint, Exhibit A).[29]

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[29] Any person or entity that advertises in violation of Section 4-498(e)(5) of Act 199 commits a misdemeanor and can be fined between $100.00 and $500.00 or imprisoned up to three months for the first offense. A second offense carries a mandatory minimum sentence of three months' (continued...)

9. Pitt's Board of Trustees established a Student Publications Board (the SPB) "in recognition of the constitutional right of students to freedom of speech." (SPB Constitution, Article I). The SPB consists of 14 to 16 members, all of whom are either Pitt students or individuals meeting certain qualifications, such as "persons with professional experience in business" or "in editorial journalism." (SPB Constitution, Article II).

10. The SPB is the publisher of *The Pitt News* and "has all publishing responsibilities and authority, excluding those related to the editorial and advertising content of the [newspaper]." (SPB Constitution, Article VI, Section 1). The SPB's chief responsibilities are the oversight of funds and the selection of students to serve as the newspaper's editor-in-chief and business manager.[30] The total budget for *The Pitt News* for the 1998-1999 school year was $603,000.00.

11. Pitt assigns a full-time staff member, known as the Student Media Advisor, to advise and assist the students operating *The Pitt News*. Neither the SPB nor the Student Media Advisor has editorial control over either the substantive or advertising content of *The Pitt News*.[31] *The*

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[29] (...continued)
imprisonment. 47 P.S. § 4-494(a).

[30] Pamela Cotter, the managing editor of McKeesport's *Daily News*, has been a member of the SPB for the past three years. According to Ms. Cotter, who testified on behalf of *The Pitt News* at the preliminary injunction hearing, the SPB acts as the publisher of *The Pitt News*, creating a budget for the newspaper and channeling the funds received by the newspaper. Ms. Cotter confirmed the fact that the SPB does not intrude into the editorial functions of *The Pitt News*.

[31] Harry Kloman is the current Student Media Advisor for *The Pitt News*. Mr. Kloman also teaches journalism classes and writes for a magazine called *In Pittsburgh*. Mr. Kloman's function as Student Media Advisor is to read the newspaper everyday and critique it to enable the students to produce a
(continued...)

Pitt News is operated entirely by Pitt students, and the editor-in-chief has final editorial control over the substantive content of *The Pitt News*. The student business manager for *The Pitt News* is responsible for the newspaper's business and advertising practices.

12. *The Pitt News* operates in the same fashion and under the same journalistic and newspaper business standards that govern non-student daily newspapers, such as the *Pittsburgh Post-Gazette* and the *Pittsburgh Tribune Review*. *The Pitt News* is distributed free of charge throughout Pitt's main campus, which is located in the Oakland section of the City of Pittsburgh.

13. The expenses of *The Pitt News* include the salaries of its professional staff, telephone, printing and equipment costs, as well as the cost of Internet access. The newspaper's sole source of revenue is advertising sales.[32]

14. On December 9, 1997, Terry Lucas, the General Manager of *The Pitt News*, received a fax from the owner of the Fuel & Fuddle, an area restaurant that placed alcohol-related advertisements in *The Pitt News*.[33] The fax consisted of a letter dated December 4, 1997 from the BLCE to the Fuel & Fuddle, which reads as follows:

* * *

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[31] (...continued)
better paper through his expertise. During his testimony at the preliminary injunction hearing, Mr. Kloman confirmed the fact that he has no editorial control over the newspaper.

[32] Pitt students are paid commissions to gather advertising for the newspaper.

[33] As the General Manager of *The Pitt News*, Mr. Lucas is responsible for overseeing the production, editorial, business and advertising functions of the newspaper. He also is responsible for the profitability of the newspaper.

The Bureau of Liquor Control Enforcement through its investigation has received information of the following alleged violation which may result in the issuance of a citation to show cause why your license should not be suspended or revoked or a fine imposed, or both.

1. ADVERTISED, OR PERMITTED TO BE ADVERTISED, ALCOHOLIC BEVERAGES, EITHER DIRECTLY OR INDIRECTLY, IN A PUBLICATION PUBLISHED BY, FOR, OR IN BEHALF OF AN EDUCATIONAL INSTITUTION. October 23, 1997

Date Investigation Begun: November 25, 1997
Date Investigation Completed: November 25, 1997

No other information will be furnished concerning this matter unless the Bureau determines that a citation will be issued.

(Exhibit 2).

Based on this notice from the BLCE, the owner of the Fuel & Fuddle called Mr. Lucas to cancel the restaurant's advertising contract with *The Pitt News*.[34] After receipt of this fax in December, 1997, *The Pitt News* did not accept any further alcohol-related advertisements.

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[34] Apparently, the logo of the Fuel & Fuddle contains the word "brews." Therefore, the owner believed that any advertisement in *The Pitt News* would violate Act 199 and subject the restaurant to a citation by the BLCE.

15. In response to the fax from the owner of the Fuel & Fuddle, Mr. Lucas contacted Gary Hamilton, the General Manager of *The Daily News* at Penn State University, to discuss Act 199, and they decided that liability under Act 199 did not extend to their newspapers. Rather, liability under Act 199 was limited to the liquor licensees who advertised in the newspapers.

16. In response to the fax from the owner of the Fuel & Fuddle, Mr. Lucas also sent a letter to establishments that advertised in *The Pitt News*, who have liquor licenses. In summary, Mr. Lucas' letter, which is dated January 29, 1998, states that one of the newspaper's advertisers received a warning letter in early December as a result of the alleged violation of Act 199, a new Pennsylvania law, in connection with its advertisement in *The Pitt News*; that the LCB issued Advisory Notice No. 15 on August 6, 1997 to answer questions arising from the new law; that, under Advisory Notice No. 15, liquor licensees are (a) prohibited from mentioning alcohol or the availability of alcohol in print advertising in college newspapers, and (b) permitted to advertise their name, location and non-alcoholic products in college newspapers; that *The Pitt News* believes the new law violates the Pennsylvania and United States Constitutions; that the business/advertising department of *The Pitt News* was instructed to avoid putting an advertiser's business at risk by accepting alcohol-related advertising; and that, as long as Act 199 is enforced, *The Pitt News* would do its best to comply with the law and the LCB's Advisory Notice No. 15.[35] (Exhibit 3).

17. After Mr. Lucas sent his January 29, 1998 letter to the liquor licensees who advertised in *The Pitt News*, the newspaper was not very successful in getting advertisements

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[35] Mr. Lucas attached a copy of the LCB's Advisory Notice No. 15 to his January 29, 1998 letter.

from these establishments that did not mention alcohol. Moreover, several restaurants and bars in the Strip District of the City of Pittsburgh, who had approached *The Pitt News* about the prospect of placing advertisements in the newspaper, declined to place any advertisements because alcohol could not be mentioned.[36]

18. In 1998, *The Pitt News* lost approximately $17,000.00 in revenue, which it attributes, in large part, to the BLCE's enforcement of Act 199.[37] This loss of revenue has affected the length of the newspaper,[38] as well as the ability of *The Pitt News* to make capital expenditures, such as refurbishing its offices and purchasing new computers and digital cameras to enhance the quality of the newspaper.

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[36] The evidence offered by *The Pitt News* at the preliminary injunction hearing indicated that some area bars and restaurants continued to place advertisements in the newspaper, despite the ban on mentioning alcohol in the advertisements. These bars and restaurants include The Original Hot Dog Shop, C.J. Barney's and Hemingway's Cafe.

[37] Mr. Lucas testified that some of the loss may be attributable to increased expenses, such as increased printing costs. However, it was Mr. Lucas' opinion that the bulk of the loss was attributable to the enforcement of Act 199, which caused many establishments to discontinue advertising in *The Pitt News*. Also, the estimated loss of revenue for 1998 does not include any lost profits as a result of the decision of the restaurants and bars in Pittsburgh's Strip District not to advertise in *The Pitt News* because they could not mention alcohol in their ads.

[38] According to the testimony offered by *The Pitt News* at the preliminary injunction hearing, the length of a newspaper is determined by the amount of its advertising revenue because the relationship between the advertising content and the news content of a newspaper is approximately 50/50. Therefore, any reduction in advertising necessarily results in a reduction in the size of the newspaper. At the preliminary injunction hearing, Mr. Kloman, the Student Media Advisor for *The Pitt News*, testified that he was aware of several large stories that the newspaper could not print as a result of the loss in revenues attributable to the enforcement of Section 4-498(e)(5) of Act 199.

According to Mr. Lucas, the continuing loss of revenue experienced by *The Pitt News* due, in large part, to the enforcement of Act 199, will prevent the newspaper from giving students a "real world experience" because of the rapidly changing technology in this area, which, in turn, equates to a reduction in their competitiveness in the marketplace. Moreover, the low profit margin of the newspaper at this time will necessitate an increase in the rates charged for advertising in the newspaper, which will affect the newspaper's competitiveness in soliciting advertisements.

19. From May, 1998 until several days before the hearing on the motion of *The Pitt News* for a preliminary injunction, Harold Turner served as the Editor-in-Chief of the newspaper. In this position, Mr. Turner was responsible for the newspaper's stories, photographs and graphics and for proofreading. According to Mr. Turner, *The Pitt News* is distributed in 75 locations on and around Pitt's campus, and Mr. Turner photographed a number of these locations to show that *The Pitt News* is displayed with other free weekly newspapers in clusters of boxes on campus. (Exhibits 4-5, 7-11). These other weekly publications, including *In Pittsburgh*, the *City Paper* and *UR Pittsburgh*, contain alcohol-related advertisements. (Exhibits 14-16). In addition, magazines containing alcohol-related advertisements, such as *Rolling Stone* and *Sports Illustrated*, are sold on Pitt's campus and delivered to Pitt students in the dormitories. (Exhibits 17-18). Finally, Mr. Turner noted that there are beer advertisements on television, and cable television is provided free of charge to Pitt students in the dormitories and there are televisions in the student lounges on Pitt's campus.

20. Jon P. Nelson has been a professor of economics at The Pennsylvania State University in State College, Pennsylvania since 1969. The courses taught by Professor Nelson deal with public policy issues, and the main focus of

his research is government regulation, including the regulation of alcohol-related advertising. Professor Nelson has studied and published articles on the effect of restrictions on alcohol-related advertising on alcohol consumption, and, in all of his studies, Professor Nelson has concluded that there is no correlation between advertising and the increased consumption of alcohol. In Professor Nelson's opinion, Section 4-498(e)(5) of Act 199 will not be effective in discouraging underage and binge drinking by college students in Pennsylvania.

21. With respect to the interpretation of Section 4-498(e)(5) of Act 199, *The Pitt News* submitted the deposition of Faith S. Diehl, Esquire, Chief Counsel for the LCB.[39] During her deposition, Attorney Diehl testified that Section 4-498 of Act 199 only applies to liquor licensees and manufacturers. Therefore, by its very terms, Section 4-498 would not apply to *The Pitt News* for purposes of enforcement actions.[40] Attorney Diehl also testified that a commercial transaction is a necessary predicate to a violation of Section 4-498(e)(5) of Act 199, although Section 4-498 does not contain the word "commercial." In other words, according to Attorney Diehl's interpretation of Section 4-498(e)(5), the alcohol-related advertiser must have paid for the advertisement in order to violate that section of Act 199. (Exhibit 21).

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[39] As noted above, the LCB is responsible for interpreting Pennsylvania's Liquor Code and its regulations.

[40] According to Attorney Diehl, the individuals or entities that are subject to the restrictions of Section 4-498(e)(5) of Act 199 are those individuals and entities listed in Section 4-498(a) of Act 199 or liquor manufacturers, wholesalers, retailers, shippers and licensees. (Exhibit 21, pp. 25-26). Based on this interpretation, it is clear that *The Pitt News* could not be cited by the BLCE for violating Section 4-498(e)(5) of Act 199 for printing alcohol-related advertisements in its newspaper.

22. With respect to the interpretation of Section 4-498(e)(5) of Act 199, *The Pitt News* also submitted the deposition of Stanley Woloski, who is employed by the Office of the Chief Counsel of the Pennsylvania State Police and assigned to the BLCE. In connection with Attorney Diehl's interpretation of Section 4-498(e)(5) as requiring a commercial transaction, Attorney Woloski testified that he did not "wholeheartedly agree" with her interpretation. Despite his disagreement, however, Attorney Woloski noted that the BLCE was bound by the LCB's interpretations of the Liquor Code and its regulations.[41] (Exhibit 22).

Conclusions of Law

23. In ruling on a motion for a preliminary injunction, the district court must consider the following factors: (a) the likelihood that the plaintiff will prevail on the merits at the final hearing; (b) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (c) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (d) the public interest. The preliminary injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary injunctive relief. *See New Jersey Hospital Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir.1995).

24. In determining whether *The Pitt News* has satisfied the requirements for a preliminary injunction against the enforcement of Section 4-498(e)(5) of Act 199, the court

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[41] As to the number of citations issued by his office for violations of Section 4-498(e)(5) of Act 199 since its effective date, Attorney Woloski testified that he was aware of three citations, including the citation issued to the Fuel & Fuddle for its advertisement in the October 23, 1997 issue of *The Pitt News*. Attorney Woloski further testified that *The Pitt News* was not cited as a result of this advertisement because it is not a liquor licensee. Therefore, Act 199 does not apply to it.

must again visit the issue of standing. In their proposed findings of fact and conclusions of law, defendants have renewed their argument that *The Pitt News* lacks standing to pursue its motion for injunctive relief, and, after consideration of the evidence offered at the preliminary injunction hearing, the court concludes that *The Pitt News* does lack standing.

25. This action was filed by *The Pitt News* and the American Civil Liberties Union Student Club at the University of Pittsburgh (ACLU Club) on April 6, 1999. On April 14, 1999, defendants moved to dismiss the action under Fed.R.Civ.P. 12(b)(1) based on plaintiffs' alleged lack of standing. By memorandum and order dated April 27, 1999, the court denied defendants' motion to dismiss the claims of *The Pitt News* based on its alleged lack of standing. However, the court granted the motion as to the ACLU Club, concluding that the ACLU Club's alleged injury was the type of "conjectural" or "hypothetical" injury that the United States Supreme Court noted in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), was insufficient to establish standing.[42]

26. In the court's decision addressing defendants' motion to dismiss the claims asserted by *The Pitt News* on the ground that *The Pitt News* lacked standing, which was based solely on the pleadings, the court concluded from the

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[42] The ACLU Club sponsors monthly coffee house discussions during which invited speakers discuss topics with students involving civil liberties, and the discussions are usually held at restaurants near the University of Pittsburgh that serve alcohol. As a result of Section 4-498(e)(5) of Act 199, the ACLU Club discontinued advertisements of its monthly discussions that contained information about the availability of beer specials or alcohol at the discussions, and the ACLU Club claimed that it could not attract as many students to the discussions. However, the court concluded that this was the type of "conjectural" or "hypothetical" injury that was insufficient to establish standing under *Lujan*.

allegations of the complaint that "[a]s a result of Section 4-498(e)(5) of Act 199, the editors of *The Pitt News* no longer have the freedom to accept and publish alcohol-related advertisements." (April 27, 1999 Memorandum, p. 6). The evidence offered at the preliminary injunction hearing on April 28, 1999, however, contradicted this conclusion.

27. The evidence offered at the preliminary injunction hearing established that enforcement of Section 4-498(e)(5) of Act 199, or the threat of such enforcement, caused area restaurants and bars to discontinue alcohol-related advertising in *The Pitt News* publications, which decreased advertising revenue, and that the decrease in revenue has brought about a small reduction in the number of pages in *The Pitt News* and in the number (or length) of the articles published. However, it was clear from the testimony of Chief Counsel for the LCB that the prohibitions of Section 4-498(e)(5) of Act 199 only apply to liquor licensees and manufacturers and not to entities, such as *The Pitt News*, so that *The Pitt News* could not be cited by the BLCE for printing alcohol-related advertisements in its publications. Therefore, the impact of the enforcement of Section 4-498(e)(5) of Act 199 has been, and will be, indirect and monetary with respect to *The Pitt News*. Such enforcement will not affect in any way the content of the material that *The Pitt News* chooses to publish.

28. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court of the United States addressed the issue of a party's standing under Article III of the Constitution of the United States. Concerning this issue, Justice Scalia stated:

* * *

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, see id., at 756; *Warth v. Seldin*, 422

> U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n.16 (1972); (footnote omitted) and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore*, *supra*, at 155 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43.

The party invoking federal jurisdiction bears the burden of establishing these elements. . . .

* * *

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction--and perhaps on the response of others as well. The existence of one or more of the essential elements

of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see also *Simon*, *supra*, at 41-42; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. E.g., Warth, *supra*, at 505. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen*, *supra*, at 758; *Simon*, *supra*, at 44-45; *Warth*, *supra*, at 505.

* * *

504 U.S. at 560-562.

Similarly, in the present case, the asserted injury of *The Pitt News* arises out of the State's alleged unlawful regulation of liquor licensees, who purportedly would, if permitted, advertise in *The Pitt News* publications, increasing its advertising revenues. The harm allegedly sustained by *The Pitt News* that is traceable to the enforcement of Section 4-498(e)(5) of Act 199 is the loss of future revenue that would have been received from publishing the prohibited advertisements in *The Pitt News* publications.

29. The claim of *The Pitt News* in this case is analogous to the claim asserted by the plaintiff in *AMSAT Cable Ltd. v. Cablevision of Connecticut*, 6 F.3d 867 (2d Cir.1993). In that case, plaintiff, AMSAT Cable Ltd. (AMSAT), alleged that the enforcement of Connecticut's mandatory cable access law, mandating access by competitors to apartment complexes served by AMSAT, violated AMSAT's First Amendment rights. Affirming the district court's entry of summary judgment in favor of defendants, the United States Court of Appeals for the

Second Circuit held that such enforcement did not give rise to a First Amendment claim by AMSAT. With respect to this issue, the Second Circuit stated:

* * *

1. *Right of Exclusion*

AMSAT contends that the First Amendment protects it against enforcement of § 16-333a to provide cable competitors like Cablevision with access to apartment complexes to which SMATV operators like AMSAT currently have exclusive access. AMSAT's theory is based on the assertion that its operations would not remain economically viable, and therefore its speech would be silenced, were it placed in direct competition with franchised cable service providers.

AMSAT proceeds on the erroneous premise that it has a constitutional right not only to speak, but to speak profitably. The First Amendment protects a cable operator's right to make certain programming decisions and to disseminate its speech, as well as its viewers' rights to receive speech. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 444-45, 111 S.Ct. 1438, 1442, 113 L.Ed.2d 494 (1991)(noting that cable television operators engage in First Amendment protected speech). But "the first amendment does not guarantee that someone will listen to [AMSAT's] speech, nor pay to listen." *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638, (11th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991). Ending AMSAT's monopoly control over cable service in buildings it now serves may drive AMSAT out of business. But this does not give rise to a First Amendment claim.

The result in this case follows *a fortiori* from the Eleventh Circuit's recent well-reasoned decision in *Niceville*. In that case, the defendant city chose to go into the cable business, providing service in direct competition with plaintiff Warner, a private franchised cable provider. As in the case at bar, the entry of the new competitor into the marketplace did not impose any direct impediments upon prior-service-provider Warner's ability to continue its operations. However, Warner contended that the city's establishment of a competing cable system would have the effect of either greatly diminishing Warner's business or driving it entirely out of business. Therefore, Warner reasoned, the city was engaging in an abridgment of speech. *See id.* at 636-37.

The court rejected Warner's argument, stating that "[t]he assertion that the City's plan 'abridges Warner's *right* to speak' ... is simply inaccurate." *Id.* at 637. Rather,

> What the City's ordinance does abridge is the continuation of Warner's profitable position as the only speaker in a captive cable market. A City-owned cable system, if successful, will no doubt reduce the audience for Warner's speech and diminish the profitability of that speech. Such economic loss, however, does not constitute a *first amendment injury*. "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression."

Id. at 638 (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78, 96 S.Ct. 2440, 2456, 49 L.Ed.2d

310 (1976)(Powell, J., concurring))(emphasis in original);...

* * *

6 F.3d at 871.

After consideration, the court concludes that *The Pitt News* has not shown that the enforcement of Section 4-498(e)(5) of Act 199 will cause a First Amendment injury. The harm that it has suffered, and may suffer in the future, has been, and will be, economic, and the harm has not affected, and will not affect, the rights of *The Pitt News* to freedom of speech or of the press. Because the injury suffered, or to be suffered, by *The Pitt News* arising from the enforcement of Section 4-498(e)(5) of Act 199 is not, and will not be, a concrete and particularized invasion of a legally protected interest of *The Pitt News*, but, rather, an indirect economic injury, *The Pitt News* has failed to establish its standing to assert its request for a preliminary injunction.

30. Assuming, *arguendo*, that *The Pitt News* had standing to pursue its motion, the court nevertheless concludes that it has failed to establish the requirements for preliminary injunctive relief. Specifically, the court concludes that *The Pitt News* has failed to establish that it has been irreparably injured by the enforcement of Section 4-498(e)(5) of Act 199. As noted above, the injury sustained by *The Pitt News* is an economic injury that could be redressed by money damages.[43] Under the circumstances, the

[43] In this connection, the court notes that, in light of the annual budget of *The Pitt News*, which is over $600,000.00, the loss of $17,000.00 in advertising revenue (less than 3%) as a result of the enforcement of Section 4-498(e)(5) of Act 199 appears to be minimal.

motion of *The Pitt News* for a preliminary injunction will be denied.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE PITT NEWS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.99-529
	)	
D. MICHAEL FISHER, in his capacity as Attorney General of the Commonwealth of Pennsylvania, MAJOR FRANCIS KOSCELNAK, in his capacity as Director of the Bureau of Liquor Control Enforcement, Pennsylvania State Police, and JOHN E. JONES, III, in his capacity as Chairman of the Pennsylvania Liquor Control Board,	)	
	)	
Defendants.	)	

ORDER

AND NOW, this 1st day of July, 1999, in accordance with the foregoing findings of fact and conclusions of law, it is ORDERED that the motion of plaintiff, *The Pitt News*, for a preliminary injunction under Fed.R.Civ.P. 65 be, and hereby is, denied.

William L. Standish
United States District Judge

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3545

The Pitt News,

Appellant

v.

D. MICHAEL FISHER, in his capacity as Attorney General of the Commonwealth of Pennsylvania; MAJOR FRANCIS KOSCELNAK, in his capacity as Director, Bureau of Liquor Control Enforcement, Pennsylvania State Police; JOHN E. JONES, III, in his capacity as Chairman, Pennsylvania Liquor Control Board

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On Appeal From The United States District Court
for the Western District of Pennsylvania
(D.C. No. 99-cv-00529)

SUR PETITION FOR REHEARING

BEFORE: BEKCER, *Chief Judge*,
SLOVITER, MANSMANN, NYGAARD, ALITO, ROTH,
MCKEE, RENDELL, BARRY, AMBRO and FUENTES,
Circuit Judges

The Petition for rehearing filed [sic] the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/

United States Circuit Judge

DATE: Aug. 17 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3545

The Pitt News,
Appellant

v.

D. MICHAEL FISHER, in his capacity as Attorney General of the Commonwealth of Pennsylvania; MAJOR FRANCIS KOSCELNAK, in his capacity as Director, Bureau of Liquor Control Enforcement, Pennsylvania State Police; JOHN E. JONES, III, in his capacity as Chairman, Pennsylvania Liquor Control Board

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On Appeal From The United States District Court
for the Western District of Pennsylvania
D.C. No. 99-cv-529
District Judge: Hon. William L. Standish

Present: MANSMANN, NYGAARD, and RENDELL,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on February 1, 2000

On consideration whereof, it is now here ordered and adjudged by this Court that Appellant, *The Pitt News*, has standing to challenge 47 P.S. §4-498(e)(5) on its own behalf, but lacks standing to challenge it on behalf of its former advertisers or its adult readers. The Court therefore does not reach the merits of its constitutional challenges regarding those parties. As for *The Pitt News'* own First amendment challenge, the Court concludes that the newspaper has not shown a likelihood of succeeding on the merits of its claim that the enforcement of 47 P.S. §4-498(e)(5) has violated its right to free speech. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marci M. Waldron

Acting Clerk

Dated: June 06 2000

Certified as a true copy and issued in lieu of a formal mandate on August 25, 2000.

Teste: /s/ Marcia M. Waldron

Acting Clerk, United States Court of Appeals for the Third Circuit

Supreme Court, U.S.
FILED
DEC 15 2000
OFFICE OF THE CLERK

(2)

No. 00-783

In the Supreme Court of the United States

THE PITT NEWS,
Petitioner

v.

D. MICHAEL FISHER, MAJOR FRANCIS KOSCELNAK, AND JOHN E. JONES, III,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1997

QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying a motion to preliminarily enjoin the enforcement of a duly enacted statute pending its challenge in the courts below?

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STATEMENT OF THE CASE

1. This petition arises out of petitioner's efforts to preliminarily enjoin the respondents from enforcing a statute against others, pending petitioner's challenge to its constitutionality on First Amendment grounds. Pet. App. 3a. Petitioner is *The Pitt News*, a student newspaper located at the University of Pittsburgh. C.A. App. 9b.[1] Respondents are D. Michael Fisher, the Attorney General of Pennsylvania; Major Francis Koscelnak, the Director of the Bureau of Liquor Control Enforcement within the Pennsylvania State Police; and John E. Jones, III, the Chairman of the Pennsylvania Liquor Control Board, an agency of the Commonwealth. Pet. App. 24a.

Petitioner challenges a provision of the Pennsylvania Liquor Code, codified at Pa. Stat. Ann., tit. 47, §4-498 (Purdon 1997) and known as "Act 199." Act 199 substantially rewrote Section 4-498, and added the following provisions which are pertinent to this case:

> (e) The following shall apply to all alcoholic beverage and malt beverage advertising:
>
> (5) No advertisement shall be permitted, either directly or indirectly, in any ... newspaper ... by, for or in behalf of any educational institution.

* * * * *

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[1]The Appendix and Supplemental Appendix in the Court of Appeals will be referred to respectively as "C.A. App. ___" and "C.A. Supp. App. ___."

> (g) For purposes of this subsection, the term "advertisement" shall mean any advertising of alcoholic beverages through the medium of ... newspapers....

47 P.S. §4-498(e)(5), (g) (Purdon 1996).[2] Violations of Act 199 are misdemeanors. First offenses are punishable by a fine of between $100 and $500 or imprisonment for up to three months; second offenses carry a mandatory minimum sentence of three months in jail.

Act 199 applies only to liquor licensees or manufacturers, and not to publishers. Pet. App. 35a & n.40. Thus, a bar or restaurant that advertises drink specials or other information pertaining to alcoholic beverages in *The Pitt News*

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[2]The full text of these provisions is as follows:

(e) The following shall apply to all alcoholic beverage and malt beverage advertising:

> (5) No advertisement shall be permitted, either directly or indirectly, in any booklet, program book, year book, magazine, newspaper, periodical, brochure, circular or other similar publication published by, for or in behalf of any educational institution.
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> * * * * *
>
> (g) For purposes of this subsection, the term "advertisement" shall mean any advertising of alcoholic beverages through the medium of radio broadcast, television broadcast, newspapers, periodicals or other publication, outdoor advertisement or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.

could be subjected to prosecution, but petitioner or its staff could never be prosecuted. Pet. App. 5a.

The objectives of Act 199 are to combat the problems of both underage drinking, and binge drinking by individuals of all ages, on college campuses. Pet. App. 27a. As to the effectiveness of Act 199 in achieving those objectives, the district court was advised of and provided with copies of three studies that established a definite correlation between alcohol advertising and increased alcohol consumption, particularly among the young. C.A. App. 202b-203b; C.A. Supp. App. 1-65; C.A. Supp. App. 34, 49-50, 53.

Petitioner publishes on each weekday during the school year and weekly during the summer, and receives all of its funding from advertising revenues. For the academic year 1998-1999, petitioner operated on a budget of over $603,000. Pet. App. 29a. In December of 1997, petitioner learned that one of its advertisers had been cited for violating Act 199; subsequently, petitioner informed its advertisers that it would no longer accept alcohol-related advertising. Pet. App. 30a-32a. In 1998, petitioner lost about $17,000 in revenue which it attributed, in large part, to the enforcement of Act 199; although some of the loss was attributable to other costs such as increased expenses. Pet. App. 33a. This loss of revenue affected the length of petitioner's newspaper. Pet. App. 33a.

2. Petitioner brought this action in the United States District Court for the Western District of Pennsylvania pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the enforcement of Act 199. Petitioner filed its action in April of 1999, and immediately moved for a preliminary injunction. After an evidentiary hearing, the district court denied the motion for a preliminary injunction. Pet. App. 45a. The district court held that petitioner lacked

standing to challenge Act 199, Pet. App. 38a-43a; and that, in any case, petitioner had failed to establish that enforcement of Act 199 had caused irreparable injury. Pet. App. 43a-44a.

3. The Court of Appeals affirmed the denial of the preliminary injunction, although on reasoning different from that of the District Court. The Court of Appeals held that petitioner did have standing to challenge Act 199, but held that petitioner had not shown that it was likely to succeed on the merits of its First Amendment claim. The Court of Appeals noted that, while Act 199 restricts the advertising which liquor licensees may buy, it "does not directly restrict the content of *The Pitt News*." Pet. App. 21a. Thus, while area bars, for example, may not advertise their nightly drink specials in *The Pitt News*, the "*The Pitt News* could ... contact area bars, find out what their nightly drink specials are, and publish a weekly listing of goings-on about town...." *Ibid.*

While "*The Pitt News* had demonstrated a connection between the enforcement of Act 199 and the reduction in its advertising revenues, ... [that] does not mean that one of its constitutionally protected interests has been injured." *Ibid.* Rather, Act 199 "amounts to nothing more than an incidental economic effect of a regulation aimed at closely regulated third parties." *Ibid.* "Thus, although *The Pitt News* has no doubt felt an economic effect resulting from the enforcement of Act 199, this does not amount to a violation of its First Amendment rights." Pet. App. 22a-23a.

REASON FOR DENYING THE WRIT

Petitioner does not claim that this case presents a novel issue of federal law which the Court has not, but should, address. Nor does petitioner claim that this case presents an issue on which the courts of appeals have issued conflicting decisions; indeed, to the extent that the petition addresses this issue at all, it suggests that the lower courts are in substantial -- although in petitioner's view, erroneous — agreement on the proper approach to claims such as are presented here. *See* Pet. at 20 & n.13 (collecting cases).

Rather, petitioner relies simply on the assertion that the Court of Appeals' decision is "inconsistent with at least four well established First Amendment doctrines." Pet. at 13. In other words, petitioner thinks that the Court of Appeals decided this case incorrectly. Petitioner may well believe that this presents an issue of "exceptional national importance," Pet. at 12; but disagreement over the application of established principles to the facts of a specific case does not merit the Court's discretionary review. Moreover, petitioner's claim that this case presents "an unprecedented restriction on newspaper publication" which the Court of Appeals "exempted from First Amendment scrutiny," Pet. App. 13, rests upon a misunderstanding of both the underlying issue and the Court of Appeals' resolution of it.

The Court of Appeals Correctly Resolved this Case Through the Routine Application of Well-Established Principles.

As petitioner sees it, this case involves a "content-based law banning protected speech in a targeted class of newspapers," Pet. App. 13, which the Court of Appeals upheld

in the face of various constitutional challenges. Petitioner is wrong in two respects.

First, as both the Court of Appeals and the District Court appreciated, Act 199 does not ban any speech by the petitioner. Pet. App. 5a, 35a & n.40. Act 199 places no restrictions, disabilities or obligations of any kind on petitioner; Act 199 leaves petitioner free to say, or print, whatever it wants, including information related to alcohol. Pet. App. 21a. Act 199 simply does not apply to petitioner; it applies only to liquor licensees and manufacturers.[3] What is at stake here for petitioner is not the right to speak or print, but the "right," if it can be called that, to be free from the incidental effects of restrictions on a closely regulated industry.

Second, while petitioner raises numerous constitutional challenges to Act 199 in its petition; the merits of those challenges have yet to be considered by any court. What the Court of Appeals has decided here, is to affirm the district court's denial of the extraordinary remedy of preliminarily enjoining enforcement of a duly enacted state statute pending its challenge in the courts below. That decision by the Court of Appeals is based upon this Court's decision and provides no basis for this Court to grant certiorari.

Petitioner sought before the district court the truly extraordinary remedy of preliminarily enjoining a duly enacted state statute pending its challenge in the courts. This Court has repeatedly held that such statutes are presumptively

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[3]The Court of Appeals noted that, even as to those to whom it applies, Act 199 effects no "substantial abridgement of their free speech rights," leaves open substantial alternative channels of communication, and has had no chilling effect. Pet. App. 18a.

constitutional. *Bush v. Al Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J. concurring); *Heller v. Doe*, 509 U.S. 312, 320 (1993). This Court has also long recognized that the standard of review of the grant or denial of injunctive relief is abuse of discretion. *University of Texas v. Camenisch*, 451 U.S. 390, 393 (1981), *citing Brown v. Chote*, 411 U.S. 452, 457 (1973) and *State of Alabama v. United States*, 279 U.S. 229, 231 (1929).

When applying this standard, generally the purpose of a preliminary injunction is to preserve the status quo until a trial on the merits can be held. *University of Texas v. Camenisch, supra* at 395. Here, however, petitioner seeks an injunction not to preserve but to judicially alter the status quo by enjoining enforcement of Act 199. Faced with a request for this type of relief, the Court of Appeals was very clear as to what issue was presented in this action. "[W]hether *The Pitt News* has demonstrated it is entitled to preliminary injunctive relief for the indirect economic loss it alleges." Pet. App. 20a. The Court of Appeals was also very clear as to the basis for reaching its conclusion.

> In ruling on a motion for a preliminary injunction, the district court must consider the following factors, and issue an injunction only if all four factors favor preliminary relief: (a) the likelihood that the plaintiff will prevail on the merits of its claim at the final hearing; (b) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (c) the extent to which the defendant would suffer irreparable harm if the preliminary injunction is issued; and (d) the public interest. *See New Jersey Hospital Association v.*

> *Waldman*, 73 F.3d 509, 512 (3d Cir. 1995). The district court concluded that even if *The Pitt News* had standing, the newspaper would not be entitled to a preliminary injunction because it did not show any irreparable harm. We agree, that *The Pitt News* is not entitled to preliminary injunctive relief. We need not reach to the question of irreparable harm, however, because we conclude that *The Pitt News* has not shown a likelihood of success on the merits of its claim.

Pet. App. 20a.

> We . . . proceed to the merits of the preliminary injunction *only* on the question of whether the economic effect felt by *The Pitt News* amounts to a violation of its own First Amendment rights. We hold that it does not, and will affirm.

Pet. App. 4a (emphasis added).

Petitioner now raises before this Court a whole series of other issues that have yet to be considered on the merits by any court.[4] With respect to the issue that was addressed by the Court of Appeals, whether petitioner is likely to prevail on the merits of its claim that the economic effects that it felt due to the enforcement of Act 199 against others amount to a violation of its First Amendment rights; petitioner argues that the Court

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[4]It is worth noting that in the more than six months since the Court of Appeals' decision, petitioner has taken no affirmative steps to pursue or press for a quick resolution of those issues in the district court.

of Appeals' conclusion is somehow contrary to the decisions of this Court. It is not.

The Court of Appeals held that:

> The fact that *The Pitt News* has demonstrated a connection between the enforcement of Act 199 and the reduction in its advertising revenues from purveyors of alcoholic beverages, along with the resulting reduction in the length of its publication, does not mean that one of its constitutionally protected interests has been injured. This amounts to nothing more than an incidental economic effect of a regulation aimed at closely regulated third parties. Act 199 does not directly restrict the content of *The Pitt News*. . . . *The Pitt News* "proceeds on the erroneous premise that it has a constitutional right not only to speak, but to speak profitably." *Am Sat Cable Limited v. Cable Vision of Connecticut*, 6 F.3d 867, 871 (2d Cir. 1993) (holding that although content of cable television transmissions has First Amendment protection, government regulation that has incidental economic effect of forcing a cable operator out of business does not injure operator's First Amendment rights). "[E]conomic loss . . . does not constitute a First Amendment injury. The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of [an] ordinance upon freedom of expression." *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990), *cert. denied*,

> [501 U.S. 1222 (1991)] (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976)] (Powell, J. concurring)....

Pet. App. 21a-22a.

In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), this Court was presented with a zoning ordinance that restricted where adult movie theaters could operate. In agreeing that the ordinance withstood a First Amendment challenge, Justice Powell observed that:

> The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. . . . The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of the ordinance upon freedom of expression.

Id. at 77-78 (Justice Powell concurring). *See also City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1985)(the First Amendment requires only that the City refrain from effectively denying respondent's a reasonable opportunity to operate their business within the City, the ordinance before us easily meets this requirement)(quoting *Young v. American Mini Theaters, Inc., supra*). Petitioner now asserts that the principles established in *Young, supra* and *City of Renton, supra* are somehow called into question by *Simon & Schuster, Inc. v. Members of the New York State Crime Victim's Board*, 502 U.S. 105 (1991). The assertion is incorrect.

In *Simon & Schuster*, publishers brought an action challenging the constitutionality of New York's Son of Sam

Law, a statute concerning books written by perpetrators about their crimes. The Son of Sam law applied directly to those publishers and required the publisher to take specific actions under it. *Id.* at 109, 116. Accordingly, *Simon & Schuster, Inc.* is distinguishable[5] from the present action. Unlike the Son of Sam Law, Act 199 simply does not apply to petitioner.[6] The Court of Appeals correctly determined that enforcement of Act 199 amounts to nothing more than an incidental economic effect of regulations on closely regulated third parties.[7] This Court

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[5]Despite petitioner' s assertions to the contrary, the Court of Appeals did distinguish *Simon & Schuster* in its opinion, in the context of standing; noting that in *Simon & Schuster, Inc.*, the Court held that its analysis would be the same whether the First Amendment speaker was considered to be the author or the publisher. Pet. App. 14a.

[6]That also distinguishes the present action from cases such as *Miami Herald Publishing Co v. Tornillo*, 418 U.S. 241 (1974). A case involving a state right of reply statute that applied to all newspapers and required them to print, in compliance with very detailed criteria, the reply of a candidate for public office whose personal character had been criticized by the newspaper's editorials. *Id.* at 244. In his concurrence in that decision, Justice White stated that "the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, *with news and editorial content is concerned." Id.* at 259 (emphasis added).

[7]In an effort to circumvent the Court of Appeals' analysis, petitioner also cites to a series of tax cases. However, as the Court of Appeals correctly pointed out, unlike Act 199 in all of the tax cases the statutes directly regulated or penalized the newspapers involved. *See Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (involving a discriminatory tax placed directly on the newspaper); *Minneapolis Star and Tribune v. Minnesota*

has repeatedly held that such indirect economic effects do not implicate the First Amendment. The Court of Appeals certainly did not abuse its discretion in concluding that petitioner is not likely to prevail on the merits of its claim that such indirect economic effects amount to a violation of its First Amendment rights.

In *Turner Broadcasting Systems, Inc. v. Federal Communications Commission*, 507 U.S. 1301 (1993) (Rehnquist, C.J., circuit justice), Chief Justice Rehnquist was faced with a request for relief that is remarkably similar to the relief requested here. In that action, as here, the relief sought was to enjoin enforcement of a statute pending its challenge on First Amendment grounds. *Id.* at 1301. In that action, as here, the courts below had denied such injunctive relief. *Id.* at 1302. In that action, as here, an injunction was not being sought to preserve the status quo, but to judicially intervene to alter it. *Id.*

> By seeking an injunction, applicants request that I issue an order altering the legal status quo. Not surprising, they do not cite any case in which such extraordinary relief has been granted, either by a single justice or by the whole Court.

Id. at 1302-1303. The Chief Justice denied that extraordinary relief holding that the act in question, like all statutes, is

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Commissioner of Revenue, 460 U.S. 575 (1983) (involving a Minnesota tax that was applied directly to the publication) and *Grossjean v. American Press Co.*, 297 U.S. 238 (1936) (where a Louisiana tax was applied directly to the newspaper). *See* Pet. App. 22a.

presumptively constitutional and that it should remain in effect pending a final decision on the merits.[8] *Id.* at 1302, 1304. In *Turner Broadcasting Systems, supra*, the same extraordinary relief was sought as petitioner seeks here. In that action the request for that relief was denied, it should be denied here. The petition for writ of certiorari should be denied.

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[8]When those merits were subsequently addressed by the Court the act in question was held to be constitutional. *Turner Broadcasting Systems, Inc., et al. v. Federal Communications Commission, et al.*, 520 U.S. 180, 185 (1997).

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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